REPORTS OF CASES

DECIDED BETWEEN

MAY 27, 1994 and DECEMBER 8, 1994

IN THE

Supreme Court of Nebraska

VOLUME CCXLVI

PEGGY POLACEK

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By Peggy Polacek, Reporter of the Supreme Court

For the benefit of the State of Nebraska

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[1]Retired August 31, 1994

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Number of District	Counties in District	Judges in District	City
First	Fillmore, Gage, Jefferson, Johnson, Nemaha, Pawnee, Richardson, Saline, and Thayer	Robert T. Finn	Auburn
		Orville L. Coady	Hebron
		William B. Rist	Beatrice
Second	Cass, Otoe, and Sarpy	Ronald E. Reagan	Papillion
		George A. Thompson	Papillion
		Randall L. Rehmeier	Nebraska City
Third	Lancaster	William D. Blue	Lincoln
		Donald E. Endacott	Lincoln
		Bernard J. McGinn	Lincoln
		Jeffre Cheuvront	Lincoln
		Earl J. Witthoff	Lincoln
		Paul D. Merritt, Jr.	Lincoln
Fourth	Douglas	James A. Buckley	Omaha
		James M. Murphy	Omaha
		Robert V. Burkhard	Omaha
		Stephen A. Davis	Omaha
		Lawrence J. Corrigan	Omaha
		Theodore L. Carlson	Omaha
		J. Patrick Mullen	Omaha
		John D. Hartigan, Jr.	Omaha
		Joseph S. Troia	Omaha
		Michael McGill	Omaha
		Richard J. Spethman	Omaha
		Mary G. Likes	Omaha
		Gerald E. Moran	Omaha
		Michael W. Amdor	Omaha
Fifth	Boone, Butler, Colfax, Hamilton, Merrick, Nance, Platte, Polk, Saunders, Seward, and York	Bryce Bartu	Seward
		Everett Inbody	Wahoo
		Robert R. Steinke	Columbus
		John C. Whitehead	Columbus

JUDICIAL DISTRICTS AND DISTRICT JUDGES

Sixth	Burt, Cedar, Dakota, Dixon, Dodge, Thurston, and Washington	Mark J. Fuhrman	Fremont
		Darvid D. Quist	Blair
		Maurice Redmond	Dakota City
Seventh	Antelope, Cuming, Knox, Madison, Pierce, Stanton, and Wayne	Richard P. Garden	Norfolk
		Robert B. Ensz	Wayne
Eighth	Blaine, Boyd, Brown, Cherry, Custer, Garfield, Greeley, Holt, Howard, Keya Paha, Loup, Rock, Sherman, Valley, and Wheeler	William Cassel	Ainsworth
		Ronald D. Olberding	Burwell
Ninth	Buffalo and Hall	John P. Icenogle	Kearney
		James Livingston	Grand Island
		Teresa K. Luther	Grand Island
Tenth	Adams, Clay, Franklin, Harlan, Kearney, Nuckolls, Phelps, and Webster	Bernard Sprague	Red Cloud
		Stephen Illingworth	Hastings
Eleventh	Arthur, Chase, Dawson, Dundy, Frontier, Furnas, Gosper, Grant, Hayes, Hitchcock, Hooker, Keith, Lincoln, Logan, McPherson, Perkins, Red Willow, and Thomas	John J. Battershell	McCook
		John P. Murphy	North Platte
		Donald E. Rowlands II	North Platte
Twelfth	Banner, Box Butte, Cheyenne, Dawes, Deuel, Garden, Kimball, Morrill, Scotts Bluff, Sheridan, and Sioux	Paul D. Empson	Chadron
		Alfred J. Kortum	Gering
		Robert O. Hippe	Gering
		John D. Knapp	Kimball
		Brian Silverman	Alliance

JUDICIAL DISTRICTS AND COUNTY JUDGES

Number of District	Counties in District	Judges in District	City
First	Gage, Jefferson, Johnson, Nemaha, Pawnee, Richardson, Saline, and Thayer	Curtis L. Maschman	Falls City
		J. Patrick McArdle	Wilber
		Steven Bruce Timm	Beatrice
Second	Cass, Otoe, and Sarpy	Larry F. Fugit	Papillion
		Robert C. Wester	Papillion
		William B. Zastera	Nebraska City
Third	Lancaster	James L. Foster	Lincoln
		Gale Pokorny	Lincoln
		Donald R. Grant	Lincoln
		Jack B. Lindner	Lincoln
		Richard H. Williams	Lincoln
		Mary L. Doyle	Lincoln
Fourth	Douglas	Samuel V. Cooper	Omaha
		Walter H. Cropper	Omaha
		John J. McGrath	Omaha
		Robert C. Vondrasek	Omaha
		Jane H. Prochaska	Omaha
		Stephen M. Swartz	Omaha
		Lyn V. Ferer	Omaha
		Thomas G. McQuade	Omaha
		Richard M. Jones	Omaha
		W. Mark Ashford	Omaha
		Edna R. Atkins	Omaha
		Lawrence Barrett	Omaha
Fifth	Boone, Butler, Colfax, Dodge, Hamilton, Merrick, Nance, Platte, Polk, Saunders, Seward, and York	Curtis H. Evans	York
		Alan G. Gless	Seward
		Mary C. Gilbride	Wahoo
		Gerald E. Rouse	Columbus
		Frank J. Skorupa	Columbus
		Gary F. Hatfield	Central City

JUDICIAL DISTRICTS AND COUNTY JUDGES

Sixth	Burt, Cedar, Dakota, Dixon, Dodge, Thurston, and Washington	Daniel J. Beckwith	Fremont
		F. A. Gossett III	Blair
		Rodney R. Smith	Dakota City
		Paul R. Robinson	Hartington
Seventh	Antelope, Cuming, Knox, Madison, Pierce, Stanton, and Wayne	Stephen P. Finn	Neligh
		Philip R. Riley	Creighton
		Richard W. Krepela	Madison
Eighth	Blaine, Boyd, Brown, Cherry, Custer, Garfield, Greeley, Holt, Howard, Keya Paha, Loup, Rock, Sherman, Valley, and Wheeler	August F. Schuman	Ainsworth
		Alan L. Brodbeck	O'Neill
		Gary G. Washburn	Burwell
Ninth	Buffalo and Hall	David A. Bush	Grand Island
		Philp M. Martin, Jr.	Grand Island
		Gerald R. Jorgensen	Kearney
		Graten D. Beavers	Kearney
Tenth	Adams, Clay, Fillmore, Franklin, Harlan, Kearney, Nuckolls, Phelps, and Webster	Harry C. Haverly	Hastings
		Jack Robert Ott	Hastings
		Daniel Bryan, Jr.	Geneva
Eleventh	Arthur, Chase, Dawson, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Hooker, Keith, Lincoln, Logan, McPherson, Perkins, Red Willow, and Thomas	Lloyd G. Kaufman	Lexington
		Kristine R. Cecava	Ogallala
		Kent E. Florom	North Platte
		Cloyd Clark	McCook
		B. Bert Leffler	Benkelman
Twelfth	Banner, Box Butte, Cheyenne, Dawes, Deuel, Garden, Grant, Kimball, Scotts Bluff, Sheridan, and Sioux	Charles Plantz	Rushville
		James T. Hansen	Chadron
		James L. Macken	Gering
		G. Glenn Camerer	Gering
		Thomas H. Dorwart	Sidney
		C. G. Wallace	Kimball

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County	Judges	City
Douglas	Colleen R. Buckley	Omaha
	Douglas F. Johnson	Omaha
Lancaster	Toni G. Thorson	Lincoln
	Thomas B. Dawson	Lincoln
Sarpy	Lawrence D. Gendler	Papillion

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LIST OF CASES DISPOSED OF BY FILED MEMORANDUM OPINION

No. S-42235: **State v. Williams.** Motion of appellee to set execution date sustained. Per Curiam.

No. S-88-982: **State v. Victor.** Motion of appellee to set execution date sustained. Per Curiam.

No. S-92-885: **Leslie v. Leslie.** Affirmed as modified. Hastings, C.J.

No. S-92-931: **FirsTier Leasing Co. v. Cimino.** Reversed and remanded with directions. Hastings, C.J.

No. S-92-1009: **Inserra v. McMurray.** Affirmed. Hastings, C.J.

No. S-92-1109: **Hillhouse v. Hillhouse.** Affirmed as modified. Hastings, C.J.

LIST OF CASES
DISPOSED OF WITHOUT OPINION

No. S-34-940002: **In re Application of Hong.** Application for waiver of requirement that Multistate Bar Examination be retaken considered and denied.

No. S-90-627: **FirsTier Bank v. Joosten.** Appeal dismissed for want of prosecution.

No. S-91-696: **State ex rel. NSBA v. Gilroy.** Amended motion for reinstatement sustained.

No. S-91-901: **Old Omaha Assn. v. City of Omaha.** Stipulation allowed; appeal dismissed.

No. S-93-169: **Vitols v. Personnel Bd. of City of Omaha.** Motion of appellant to dismiss appeal sustained; appeal dismissed; each party to pay own costs.

No. S-93-445: **Wilson v. 49th Street Corp.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No. S-93-590: **Shea v. Department of Motor Vehicles.** Stipulation allowed; appeal dismissed.

No. S-93-605: **Saucerman v. Department of Motor Vehicles.** Stipulation allowed; appeal dismissed.

No. S-94-006: **State v. Hogue.** By order of the court, appeal dismissed for failure to file briefs.

No. S-94-098: **Edwards Subcorp. v. Nebraska Dept. of Revenue.** Stipulation allowed; appeal dismissed.

No. S-94-295: **State v. Tlamka.** Cause having not been shown, judgment of the district court is affirmed.

No. S-94-325: **Hoit v. Hoit.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No. S-94-339: **Woodworth v. Nagengast.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

No. S-94-364: **State v. Nelson.** Motion of appellant to dismiss appeal sustained, the presentence report having been available to appellant through his counsel who has not been permitted to withdraw; appeal dismissed.

No. S-94-454: **Credit Bureau of Hastings v. Stice.** Cause having not been shown, motion of appellee for summary dismissal sustained. See Rule 7B(1).

No. S-94-522: **State v. Schmailzl.** Appeal dismissed. See Rule 7A(2).

No. S-94-522: **State v. Schmailzl.** Nebraska Court of Appeals withdraws and vacates its order of dismissal entered August 23, 1994.

No. S-94-1028: **State ex rel. NSBA v. Jacobsen.** By order of the court, respondent suspended from the practice of law in Nebraska until further order of the court.

LIST OF CASES
ON PETITION FOR FURTHER REVIEW

No. A-33-940007: **State v. Martinez** (not previously docketed). Petition of appellant for further review overruled on May 18, 1994, for want of jurisdiction.

No. A-33-940008: **State v. Martinez** (not previously docketed). Petition of appellant for further review overruled on May 18, 1994, for want of jurisdiction.

No. S-91-901: **Old Omaha Assn. v. City of Omaha**, 2 Neb. App. 618 (1994). Petition of amicus curiae First National Bank for further review overruled on July 20, 1994.

No. S-91-901: **Old Omaha Assn. v. City of Omaha**, 2 Neb. App. 618 (1994). Petition of appellant for further review sustained on July 20, 1994.

No. A-92-224: **Moxham v. Moxham**, 94 NCA No. 8. Petition of appellee for further review overruled on June 2, 1994.

No. A-92-238: **Weatherly v. Blue Cross Blue Shield**, 2 Neb. App. 669 (1994). Petition of appellant for further review overruled on June 2, 1994.

No. A-92-346: **Newman v. Hinky Dinky**, 2 Neb. App. 555 (1994). Petition of appellee for further review overruled on July 7, 1994.

No. A-92-359: **Beverly Enter. - Nebraska v. Columbus Health Care**, 2 Neb. App. 410 (1993). Petition of appellant for further review overruled on May 25, 1994.

No. A-92-366: **Finney v. Loma, Inc.**, 94 NCA No. 25. Petition of appellant for further review overruled on September 14, 1994.

No. A-92-366: **Finney v. Loma, Inc.**, 94 NCA No. 25. Petition of appellee for further review overruled on September 14, 1994.

No. S-92-392: **Freeman v. Central States Health & Life Co.**, 2 Neb. App. 803 (1994). Petition of appellee for further review sustained on June 15, 1994.

No. S-92-393: **Schmidt v. Central States Health & Life Co.**, 2 Neb. App. 803 (1994). Petition of appellee for further review sustained on June 15, 1994.

No. A-92-407: **Hennek v. Lexington State Bank**, 94 NCA No. 30. Petition of appellant for further review overruled on September 21, 1994.

No. A-92-483: **Gramercy Hill Enters. v. Westmark Fin. Corp.**, 94 NCA No. 4. Petition of appellee for further review overruled on June 2, 1994.

No. A-92-521: **Whetstone v. Cornhusker Cas. Co.**, 94 NCA No. 17. Petition of appellant for further review overruled on July 20, 1994.

No. A-92-524: **Thies v. City of Norfolk**, 94 NCA No. 14. Petition of appellant for further review overruled on May 18, 1994.

No. A-92-542: **Dowd v. City of Omaha**, 2 Neb. App. 958 (1994). Petition of appellee for further review denied on August 24, 1994.

Nos. S-92-647, S-92-648, S-92-649: **Thomas v. Countryside of Hastings**, 2 Neb. App. 590 (1994). Petitions of appellants for further review sustained on June 15, 1994.

No. A-92-684: **Alvis v. Alvis**, 94 NCA No. 15. Petition of appellant for further review overruled on June 15, 1994.

No. S-92-694: **New Light Co. v. Wells Fargo Alarm Servs.**, 2 Neb. App. 828 (1994). Petition of appellant for further review sustained on July 20, 1994.

No. S-92-704: **Coppi v. West Am. Ins. Co.**, 2 Neb. App. 834 (1994). Petition of appellee for further review sustained on July 20, 1994.

No. A-92-706: **In re Estate of Baright**, 94 NCA No. 15. Petition of appellant for further review overruled on June 2, 1994.

No. S-92-708: **Simon v. Wilkinson Agency**, 2 Neb. App. 877 (1994). Petition of appellants for further review sustained on August 24, 1994.

No. A-92-712: **Hibberd v. City of Lincoln**, 94 NCA No. 12. Petition of appellant for further review overruled on May 18, 1994.

No. S-92-752: **In re Guardianship & Conservatorship of Bloomquist**, 2 Neb. App. 756 (1994). Petition of appellant for further review sustained on May 18, 1994.

No. S-92-772: **In re Estate of Marsh**, 2 Neb. App. 649 (1994). Petition of appellee Buckles for further review sustained on June 15, 1994.

No. S-92-772: **In re Estate of Marsh**, 2 Neb. App. 649 (1994). Petition of appellee Kenner for further review sustained on June 15, 1994.

No. A-92-794: **Hagerbaumer v. Hagerbaumer**, 94 NCA No. 17. Petition of appellant for further review overruled on June 23, 1994.

No. S-92-811: **Thiltges v. Thiltges**, 94 NCA No. 24. Petition of appellant for further review sustained on August 24, 1994.

No. A-92-822: **Brosius Cattle Co. v. Philadelphia Life Ins. Co.**, 94 NCA No. 18. Petition of appellant for further review overruled on July 27, 1994.

No. S-92-825: **Centamore v. Cocanougher**, 2 Neb. App. 756 (1994). Petition of appellant for further review sustained on May 18, 1994.

No. A-92-828: **State v. Atkinson.** Petition of appellant for further review overruled on June 15, 1994.

No. A-92-857: **In re Guardianship & Conservatorship of Piller**, 94 NCA No. 17. Petition of appellant for further review overruled on August 31, 1994.

No. A-92-858: **Gage v. Hodge**, 94 NCA No. 29. Petition of appellant for further review overruled on September 14, 1994.

No. S-92-951: **Eggers v. Rittscher**, 94 NCA No. 20. Petition of appellant for further review sustained on September 28, 1994.

No. A-92-964: **Federal Deposit Ins. Corp. v. Slangal.** Petition of appellant for further review overruled on August 24, 1994.

No. S-92-975: **Ruch v. Conrad**, 94 NCA No. 25. Petition of appellant for further review sustained on October 13, 1994.

No. A-92-990: **In re Conservatorship of Kerrey**, 94 NCA No. 35. Petition of appellant for further review overruled on October 13, 1994.

Nos. A-92-1020, A-92-1021: **Reader v. Hoffman**, 94 NCA No. 36. Petition of appellant for further review overruled on October 26, 1994.

No. A-92-1064: **Carman v. Ravenna Bank**, 94 NCA No. 26. Petition of appellant for further review overruled on August 31, 1994.

No. A-92-1071: **In re Estate of Ziegenbein**, 2 Neb. App. 923 (1994). Petition of appellant for further review overruled on November 16, 1994.

No. A-92-1073: **American Economy Ins. Co. v. Modern Eye Wear**, 94 NCA No. 26. Petition of appellant for further review overruled on September 28, 1994.

No. A-92-1092: **Sostad v. Batie**, 94 NCA No. 34. Petition of appellant for further review overruled on November 9, 1994.

No. A-92-1128: **Hansen v. Hammer**, 94 NCA No. 23. Petition of appellee for further review overruled on July 27, 1994.

No. A-92-1182: **Glebe v. City of Omaha**, 94 NCA No. 32. Petition of appellant for further review overruled on September 21, 1994.

No. S-93-031: **Toulousaine de Distrib. v. Tri-State Seed & Grain**, 2 Neb. App. 937 (1994). Petition of appellee for further review sustained on September 1, 1994.

No. A-93-070: **Sudik v. City of Wahoo**. Petition of appellant for further review overruled on July 27, 1994.

No. A-93-078: **Wear v. American Fire & Cas. Co.**, 94 NCA No. 26. Petition of appellant for further review overruled on August 24, 1994.

No. S-93-129: **State ex rel. Scherer v. Madison Cty. Comrs.**, 94 NCA No. 27. Petition of appellants for further review sustained on August 31, 1994.

No. A-93-149: **State on behalf of Yankton v. Cummings**, 2 Neb. App. 820 (1994). Petition of appellant for further review overruled on July 7, 1994.

No. A-93-199: **Chalupa v. Chalupa**, 94 NCA No. 31. Petition of appellees for further review overruled on October 13, 1994.

No. A-93-266: **State v. Maisch**, 94 NCA No. 9. Petition of appellant for further review overruled on May 18, 1994.

No. A-93-282: **In re Estate of Dudek**, 94 NCA No. 30. Petition of appellant for further review overruled on September 14, 1994.

No. A-93-292: **Ballard v. Nebraska Dept. of Soc. Servs.**, 2 Neb. App. 809 (1994). Petition of appellant for further review overruled on July 7, 1994.

No. A-93-349: **Kroese v. Ferret Exploration of Neb.**, 94 NCA No. 31. Petition of appellant for further review overruled on September 21, 1994.

No. A-93-355: **In re Interest of Joshua B. et al.**, 94 NCA No. 14. Petition of appellee and guardian ad litem for further review overruled on May 18, 1994.

No. S-93-364: **State v. Null**, 94 NCA No. 20. Petition of appellant for further review sustained on June 30, 1994.

No. A-93-379: **Herald v. Blue Cross Blue Shield of Neb.**, 94 NCA No. 33. Petition of appellee for further review overruled on October 13, 1994.

No. A-93-382: **In re Interest of Robert D. et al.**, 94 NCA No. 26. Petition of appellants for further review overruled on August 24, 1994.

No. A-93-388: **State v. McMurray**. Petition of appellant for further review overruled on September 21, 1994.

No. S-93-404: **Twiss v. Trautwein**. Petition of appellant for further review sustained on October 26, 1994.

No. A-93-430: **Bridgeport Irr. Dist. v. Department of Water Res.**, 94 NCA No. 17. Petition of appellant for further review overruled on June 30, 1994.

No. A-93-432: **Stevens v. Luick**, 94 NCA No. 14. Petition of appellant for further review overruled on May 25, 1994.

No. S-93-454: **State ex rel. Grape v. Zach**, 94 NCA No. 13. Petition of appellee for further review sustained on June 15, 1994.

Nos. A-93-455 through A-93-458: **State v. Daniels**. Petition of appellant for further review overruled on October 13, 1994.

No. S-93-487: **Jirkovsky v. Jirkovsky**, 94 NCA No. 22. Petition of appellant for further review sustained on July 20, 1994.

No. A-93-562: **State v. Doremus**, 2 Neb. App. 784 (1994). Petition of appellee for further review overruled on June 15, 1994.

No. A-93-574: **State v. Schumacher**, 94 NCA No. 14. Petition of appellant for further review overruled on June 15, 1994.

No. A-93-578: **In re Interest of Maurice S.**, 94 NCA No. 17. Petition of appellant for further review overruled on June 15, 1994.

No. A-93-580: **State v. Nauslar**, 94 NCA No. 24. Petition of appellant for further review overruled on August 31, 1994.

No. S-93-592: **State v. Skalberg**, 94 NCA No. 11. Petition of appellee for further review sustained on May 18, 1994.

No. A-93-598: **State v. Swanson**, 94 NCA No. 14. Petition of appellee for further review overruled on June 15, 1994.

No. A-93-602: **State v. Barfield**, 94 NCA No. 18. Petition of appellant for further review overruled on July 20, 1994.

No. A-93-604: **Evans v. City of Gering**. Petition of appellant for further review overruled on November 9, 1994.

No. A-93-626: **Richardson v. Clarke**, 2 Neb. App. 575 (1994). Petition of appellant for further review overruled on June 2, 1994.

No. A-93-627: **Sterling v. Clarke**, 2 Neb. App. 575 (1994). Petition of appellant for further review overruled on June 2, 1994.

No. A-93-631: **State v. White**, 94 NCA No. 15. Petition of appellant for further review overruled on May 18, 1994.

No. A-93-636: **State v. Cariker**, 94 NCA No. 21. Petition of appellant for further review overruled on July 7, 1994.

No. A-93-639: **State v. Perez**, 94 NCA No. 15. Petition of appellant for further review overruled on June 2, 1994.

No. A-93-657: **Fordham v. West Lumber Co.**, 2 Neb. App. 716 (1994). Petition of appellant for further review overruled on May 18, 1994.

No. A-93-674: **Paris v. Crawford State Bank**, 94 NCA No. 23. Petitions of appellants for further review overruled on August 24, 1994.

No. A-93-700: **Ostergaard v. Clarkson Hospital**, 94 NCA No. 20. Petition of appellee for further review overruled on July 20, 1994.

No. A-93-702: **In re Interest of Eva W.**, 94 NCA No. 20. Petition of appellant for further review overruled on July 20, 1994.

No. A-93-706: **State v. Vavra**. Petition of appellant for further review overruled on July 20, 1994.

No. A-93-713: **State v. Rodriguez**, 94 NCA No. 23. Petition of appellant for further review overruled on August 31, 1994.

No. S-93-714: **Harder v. Harder**. Petition of appellant for further review sustained on May 18, 1994.

No. A-93-717: **State v. Ziemba**, 94 NCA No. 21. Petition of appellant for further review overruled on September 14, 1994.

No. A-93-720: **In re Interest of Krystal K. et al.**, 94 NCA No. 21. Petition of appellant for further review overruled on June 23, 1994.

No. S-93-728: **Shade v. Ayars & Ayars, Inc.**, 2 Neb. App. 730 (1994). Petition of appellant for further review sustained on June 15, 1994.

No. A-93-739: **World Radio Lab. v. Coopers & Lybrand**, 2 Neb. App. 747 (1994). Petition of appellant for further review overruled on July 20, 1994.

No. A-93-740: **In re Interest of Bringleson**. Petition of appellant for further review overruled on November 9, 1994.

No. A-93-746: **State v. Anderson**, 94 NCA No. 16. Petition of appellant for further review overruled on August 31, 1994.

No. S-93-755: **State v. Sorenson**, 2 Neb. App. 998 (1994). Petition of appellant for further review sustained on October 13, 1994.

No. A-93-770: **Filbert v. Globe Cleaners**, 94 NCA No. 17. Petition of appellant for further review overruled on June 23, 1994.

No. A-93-774: **State v. Rosales**, 3 Neb. App. 26 (1994). Petition of appellant for further review overruled on October 26, 1994.

Nos. A-93-811, A-93-812: **State v. Kizzire**. Petition of appellant for further review overruled on June 23, 1994.

No. A-93-830: **Chism v. Charles Vrana & Son Constr. Co.**, 94 NCA No. 19. Petition of appellant for further review overruled on July 27, 1994.

No. A-93-838: **State v. Reynolds**, 94 NCA No. 20. Petition of appellant for further review overruled on July 20, 1994.

No. A-93-840: **State v. Eadie**. Petition of appellant for further review overruled on September 28, 1994.

No. A-93-853: **State v. Vann**, 2 Neb. App. 946 (1994). Petition of appellant for further review overruled on August 24, 1994.

No. A-93-862: **State v. Rayes**, 94 NCA No. 24. Petition of appellant for further review overruled on August 24, 1994.

No. S-93-887: **Hull v. Aetna Ins. Co.**, 94 NCA No. 32. Petition of appellant for further review sustained on November 9, 1994.

No. S-93-887: **Hull v. Aetna Ins. Co.**, 94 NCA No. 32. Petition of appellee Hull for further review sustained on November 9, 1994.

No. S-93-897: **State v. Wragge**, 94 NCA No. 23. Petition of appellant for further review sustained on July 27, 1994.

No. A-93-912: **State v. Ziemba**, 94 NCA No. 17. Petition of appellee for further review overruled on June 23, 1994.

No. A-93-915: **State v. Burnett**. Petition of appellant for further review overruled on June 2, 1994.

No. A-93-916: **In re Interest of Mark B.**, 94 NCA No. 22. Petition of appellant for further review overruled on August 31, 1994.

No. A-93-961: **State v. Walton**. Petition of appellant for further review overruled on May 18, 1994.

No. A-93-974: **In re Interest of Crystal W.H.**, 94 NCA No. 38. Petition of appellee guardian ad litem for further review overruled on November 16, 1994.

No. A-93-975: **State v. Scott**, 94 NCA No. 29. Petition of appellee for further review overruled on September 14, 1994.

No. A-93-985: **In re Interest of Amanda M.**, 94 NCA No. 25. Petition of appellant for further review overruled on August 24, 1994.

No. A-93-1013: **State v. Estrada**, 94 NCA No. 27. Petition of appellant for further review overruled on August 24, 1994.

No. A-93-1053: **State v. Aldana**, 94 NCA No. 33. Petition of appellee for further review overruled on October 13, 1994.

No. S-93-1096: **State v. Lee**. Petition of appellant for further review sustained on September 21, 1994.

No. A-93-1097: **State v. Eberly**, 94 NCA No. 38. Petition of appellant for further review overruled on November 9, 1994.

No. A-93-1098: **State v. Mite**. Petition of appellant for further review overruled on May 25, 1994.

No. A-93-1099: **In re Interest of Tiffany M.**, 94 NCA No. 29. Petition of appellee for further review overruled on September 28, 1994.

No. S-93-1101: **State v. Dake**, 94 NCA No. 35. Petition of appellant for further review sustained on October 26, 1994.

No. A-93-1109: **Spiegel v. St. Paul Fire & Marine Ins. Co.**, 94 NCA No. 35. Petition of appellee Second Injury Fund for further review overruled on October 26, 1994.

No. A-93-1126: **Russell v. Department of Corr. Servs.** Petition of appellant for further review overruled on July 20, 1994.

No. A-94-012: **State v. Adams**, 94 NCA No. 29. Petition of appellant for further review overruled on September 21, 1994.

No. A-94-036: **Haney v. Aaron Ferer & Sons**, 3 Neb. App. 14 (1994). Petition of appellant for further review overruled on October 26, 1994.

No. A-94-119: **State v. Reineke**. Petition of appellant for further review overruled on November 9, 1994.

Nos. A-94-121, A-94-129, A-94-130: **State v. Meis**. Petition of appellant for further review overruled on August 31, 1994.

No. A-94-146: **State v. Malcom**. Petition of appellant for further review overruled on May 18, 1994.

No. S-94-228: **State v. Groff**, 94 NCA No. 35. Petition of appellee for further review sustained on November 23, 1994.

No. A-94-259: **State v. Henderson**, 94 NCA No. 38. Petition of appellant for further review overruled on October 26, 1994.

No. A-94-269: **Workman v. Nebraska Dept. of Banking & Finance**. Petition of appellant for further review dismissed on August 24, 1994, for lack of jurisdiction.

No. A-94-294: **State v. Eisenberg**. Petition of appellant for further review overruled on October 13, 1994.

No. A-94-317: **Nwachukwu v. Nwachukwu**. Petition of appellant for further review dismissed on August 24, 1994, for lack of jurisdiction.

No. S-94-336: **State v. Matthies**. Petition of appellant for further review sustained on September 14, 1994.

No. S-94-364: **State v. Nelson**. Petition of appellant for further review overruled on October 11, 1994.

No. A-94-470: **State v. Carrera**. Petition of appellant for further review overruled on October 25, 1994.

No. A-94-562: **State v. Dillon**. Petition of appellant for further review overruled on November 16, 1994.

No. A-94-569: **United Nebraska Bank v. Burnett**. Petition of appellant for further review overruled on August 24, 1994.

No. A-94-622: **Brown v. Butler Holdings**. Petition of appellant for further review overruled on November 9, 1994.

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

BAKODY HOMES AND DEVELOPMENT, INC., A NEBRASKA CORPORATION, APPELLANT, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, ET AL., APPELLEES.

516 N.W.2d 244

Filed May 27, 1994. No. S-92-418.

1. **Directed Verdict: Appeal and Error.** In order to sustain a motion for directed verdict, the trial court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion from the evidence. The party against whom the motion was granted is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which can reasonably be drawn from the evidence; if there is any evidence which will sustain a finding for the party against whom the motion is made, the case may not be decided as a matter of law.
2. **Pleadings.** Pleadings frame the issues upon which the cause is to be tried and advise the adversary as to what the adversary must meet.
3. **Trial: Appeal and Error.** An issue not presented to or passed upon by the trial court is not an appropriate issue for consideration upon appeal.
4. **Presumptions.** Everyone is presumed to know the law.
5. **Negligence.** One cannot be negligent in failing to perform an act which one did not in the first instance have a duty or obligation to perform.
6. **Actions: Negligence: Proof: Damages.** As an element of a negligence cause of action, a plaintiff must prove damages with reasonable certainty. The nature and amount of damages cannot be sustained by evidence which is speculative and conjectural.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Affirmed.

John M. DiMari and Duane M. Katz for appellant.

Herbert M. Fitle, Omaha City Attorney, and Charles K. Bunger for appellees City of Omaha, Joseph Rogers, and Martin Shukert.

Don Stenberg, Attorney General, Charles E. Lowe, and Gary R. Welch for appellee State of Nebraska.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, FAHRNBRUCH, and LANPHIER, JJ., and GRANT, J., Retired.

FAHRNBRUCH, J.

Bakody Homes and Development, Inc. (Bakody), sued the City of Omaha (City) and the State of Nebraska (State), alleging that each governmental unit had negligently failed to inform Bakody of the existence of a state corridor protection plan on property Bakody was developing as a townhome subdivision.

Following a bench trial, the district court for Douglas County entered a directed verdict in favor of both the City and the State. We affirm.

FACTS

In early 1982, the State's Department of Roads (Department) established corridor protection from 120th Street to west of 156th Street along West Dodge Road in Omaha. A corridor map, showing a corridor extending 300 feet either side of the centerline of West Dodge Road, was prepared by the Department and transmitted to city officials and the Douglas County clerk's office on April 28, 1982.

On December 15, 1982, Bakody entered into a purchase agreement for approximately 6 acres of land south of West Dodge Road at 153d Street, upon which Bakody planned to build 28 duplex townhomes on 2 culs-de-sac. The subdivision, known as Oakmount Townhomes, provided for a homeowner association and areas of common ground.

Frank Bakody, a homebuilder and president of Bakody Homes and Development, Inc., checked with the City's planning department in late 1982 or early 1983 regarding the feasibility of rezoning the property to permit the building of townhomes. He also consulted William Dorner, a licensed land surveyor and a principal of Thompson, Dreessen & Dorner, a land surveying and engineering company. Dorner was hired to (1) develop a preliminary plat of the subject property, (2) develop an estimated cost of improvements to the land, and (3)

assist in having the property rezoned.

On February 9, 1983, Bakody filed a preliminary application for subdivision plat with the City requesting the City's approval. On February 17, the City's development review committee suggested that Bakody check with the Department about the widening of West Dodge Road. Dorner, on behalf of Bakody, called the Department to determine whether additional right-of-way would be required by the State. The Department sent Dorner three drawings of the State's right-of-way plans for West Dodge Road in the area of the proposed subdivision as well as an aerial photograph of the area. Nothing on the drawings indicated a corridor plan.

Upon a second call to the Department, made because Dorner believed that the maps indicated a possible increase in the State's right-of-way in the area, Dorner was advised that although the State might need some of the platted common area for a grading easement, there would be no permanent taking of property. Dorner testified that he did not ask about a corridor plan and had no actual knowledge of the existence of a corridor plan at the time of the conversations with the Department.

On May 17, Bakody's final application for subdivision plat was approved by the City's development review committee. On August 30, 1983, Bakody purchased the subject property for $227,383. Subsequently, Bakody applied for, and was issued, several building permits by the City's permits and inspection division. Two townhomes were completed and sold, and townhome construction had started on four other lots when the City issued a work stoppage order on December 14, 1984, because the subdivision was located in the State's corridor plan. The stoppage order of that date included Lots 2 through 6 and 9 through 13. The order did not include Lots 1, 7, 8, and 14.

On March 22, 1985, the State advised Bakody that it was releasing Lots 2, 6, 9, 10, and 13 from the stoppage order. Frank Bakody testified at trial that he received a copy of a letter from the State to the City dated November 14, 1985, advising that Lots 3, 4, 5, 11, and 12 were released for construction.

Frank Bakody testified that, by the time all lots were released for construction, he considered the project to be "tainted" and unsalvageable because of the period of uncertainty and that he

had already begun negotiations for sale of the property to a neighboring church. On February 6, 1986, Bakody sold the improved property, minus Lot 5, to the church for $462,416.

Bakody then sued the City, pursuant to the Political Subdivisions Tort Claims Act, and the Department, pursuant to the State Tort Claims Act. Bakody also named Joseph Rogers (director of city permits and inspection) and Martin Shukert (director of the City's planning department) as additional defendants.

Bakody alleged that the City, Rogers, and Shukert were negligent in (1) approving the plat when they knew of the corridor plan; (2) issuing a building permit even though Rogers had received a copy of the corridor map; (3) failing to give the Department notice of Bakody's filing a request for a building permit, in violation of Neb. Rev. Stat. § 39-1311.01 (Reissue 1988); (4) failing to reasonably perform ministerial duties in refusing to issue the building permit to Bakody pursuant to the City's master plan; and (5) failing to properly maintain the master plan as required by the Omaha city code.

Bakody alleged that the State was negligent in failing to notify and accurately advise Bakody of the corridor, in providing Bakody with an incorrect map which did not reflect the proposed corridor, and in failing to ensure that no building permits were issued for construction in the corridor area.

In its directed verdict order entered at the conclusion of all the evidence, the court held (1) that the State had violated no duty to Bakody, (2) that the City had breached its duty to Bakody by failing to give the Department notice of the filing of Bakody's applications for building permits as required by Neb. Rev. Stat. § 39-1311.03 (Reissue 1989), (3) that there had been no "taking" of Bakody's land, (4) that Bakody had not presented a correct measure of damages, and (5) that evidence of Bakody's damages was speculative.

The court found that it had erred in overruling each defendant's motion for directed verdict at the close of all the evidence and entered an order sustaining those motions. Rogers and Shukert had been dismissed from the case as defendants in their individual capacities upon motion of the City at the close of Bakody's case in chief. Bakody timely appealed to the

Nebraska Court of Appeals, and under our authority to regulate the caseloads of the appellate courts of this state, we removed the matter to this court.

ASSIGNMENTS OF ERROR

In its appeal, Bakody claims that the district court erred in finding and holding that (1) the State violated no duty to the plaintiff, (2) the actions of the City and the State were not a taking in the sense contemplated by the Constitution of Nebraska, (3) Bakody had not presented evidence on the proper measure of damages, (4) Bakody's damage evidence was speculative and conjectural, and (5) each defendant's motion for a directed verdict should be sustained.

Because our determinations of some of the issues raised by Bakody are dispositive of this appeal, it is not necessary to discuss the remaining issues raised by Bakody's assignments of error.

STANDARD OF REVIEW

In order to sustain a motion for directed verdict, the trial court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion from the evidence. *Rohde v. Farmers Alliance Mut. Ins. Co.*, 244 Neb. 863, 509 N.W.2d 618 (1994). The party against whom the motion was granted is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which can reasonably be drawn from the evidence; if there is any evidence which will sustain a finding for the party against whom the motion is made, the case may not be decided as a matter of law. *Marple v. Sears, Roebuck & Co.*, 244 Neb. 274, 505 N.W.2d 715 (1993).

ANALYSIS

STATE'S DUTY TO BAKODY

First we turn to the issue of whether the State violated any duty to Bakody. In its brief, Bakody argues that the State violated its duty to the appellant in two ways: (1) by failing to maintain the maps required by Neb. Rev. Stat. § 39-1311(1) (Reissue 1988) and (2) by furnishing an inaccurate map to Bakody's representative, Dorner.

Bakody's first argument is confusing at best because it is inconsistent with its pleadings in its amended petition and because it appears to be based upon a misunderstanding of § 39-1311(1).

In its amended petition, Bakody alleged that

> the Defendant State and its agencies, *had a statutory duty to establish and maintain an accurate corridor map* and that the State and its agencies *were negligent in failing to notify and accurately advise* [*Bakody*] *and its representatives of the corridor and in providing* [*Bakody*] *with an incorrect map which did not reflect the proposed corridor*, and [in failing] to insure that no building permits were issued for construction in the corridor area.

(Emphasis supplied.) Although Bakody alleged in its amended pleading that the State had a *duty* to maintain an accurate corridor map, Bakody neither pled nor proved that the State *breached* its duty to maintain such a map.

Pleadings frame the issues upon which the cause is to be tried and advise the adversary as to what the adversary must meet. *Diefenbaugh v. Rachow*, 244 Neb. 631, 508 N.W.2d 575 (1993). See, also, Neb. Rev. Stat. § 25-1101 et seq. (Reissue 1989). An issue not presented to or passed upon by the trial court is not an appropriate issue for consideration upon appeal. *How v. Mars*, 245 Neb. 420, 513 N.W.2d 511 (1994); *Central States Resources v. First Nat. Bank*, 243 Neb. 538, 501 N.W.2d 271 (1993). Thus, the issue of whether the State failed to maintain the corridor map that Bakody claims it was required to maintain is not properly before this court.

Next we examine Bakody's argument that the State was negligent because the Department furnished "inaccurate" maps to Dorner. Bakody contends that, by virtue of Dorner's inquiry about State right-of-way plans, the Department was on notice that Bakody contemplated building within the corridor and that the State was negligent for failing to advise Dorner of the existence of the corridor. The State counters that it had no duty to furnish corridor plans to Bakody, because neither Bakody nor its representative, Dorner, ever requested information about the West Dodge Road corridor plan.

The statutory corridor protection plan as it existed at all

times material to this case became effective July 12, 1974. 1974 Neb. Laws, L.B. 805. It is axiomatic, and this court has held, that everyone is presumed to know the law. See, e.g., *Haman v. Marsh*, 237 Neb. 699, 467 N.W.2d 836 (1991); *Lindgren v. School Dist. of Bridgeport*, 170 Neb. 279, 102 N.W.2d 599 (1960); *Beltner v. Carlson*, 153 Neb. 797, 46 N.W.2d 153 (1951).

Bakody's representative, Dorner, a licensed surveyor retained by Bakody to assist in the platting and zoning of the Oakmount Townhome subdivision, testified that he did not know if he was aware of Nebraska's corridor protection law at that time and that he was unaware of the corridor protection plan for West Dodge Road until sometime after this incident occurred. Dorner admitted that, although he made two separate inquiries of the Department, both of those inquiries requested information about the State's need for additional *right-of-way* which would affect the plat of the subdivision. He testified that he is sure he did not ask anyone at the Department about the *corridor protection plan*.

We are unaware of any authority, nor have we been cited to any, which would hold the State liable for the Department's failing to provide *corridor maps* to Dorner when he specifically inquired about *right-of-way plans* for West Dodge Road. One cannot be negligent in failing to perform an act which one did not in the first instance have a duty or obligation to perform. *Travelers Indemnity Co. v. Center Bank*, 202 Neb. 294, 275 N.W.2d 73 (1979).

It is uncontroverted that the Department furnished Dorner with the exact information he requested on behalf of Bakody, that is, the right-of-way plans for West Dodge Road. It defies logic to impose a duty on the Department to somehow read the minds of its callers and furnish them with information accordingly.

Bakody and its agent, Dorner, are charged with knowledge of the corridor law, and Dorner's admitted unfamiliarity with the law may not be made the basis for imposing liability upon the State. The record fails to reveal any evidence whatever that the Department breached any duty in providing information that Dorner in fact requested. Thus it was not error for the trial court to hold as a matter of law that the State had not breached

any duty to Bakody and to enter a directed verdict in favor of the State.

DAMAGES

We now turn to the issue of whether the trial court erred in holding that Bakody's damages were speculative and conjectural.

Richard See, a licensed real estate appraiser called to testify by Bakody, provided expert testimony as to the alleged damages sustained by Bakody. A review of the record shows that the only actual costs used by See in his calculation of Bakody's damages were Bakody's cost to acquire the unimproved 6-acre tract of land, upon which Bakody planned to develop the Oakmount Townhome subdivision, and the sale price of the same tract of land, which at the time of sale to a neighboring church included improvements but did not include Lot 5.

See estimated most of the other costs and expenses related to the project by using the Marshall Valuation Service. See made his own estimate of $12,000 for legal expenses in connection with the project. Profit on the project was projected to be 16 percent, discounted to 12 percent to reflect a 3 1/2-year sell-out period, for an estimated profit of $178,140.

On cross-examination, See explained that he took his cost estimates from the Marshall Valuation Service rather than getting costs from Bakody because he was trying to look at the property as a buyer would look at it. He stated that his opinion was based on the market data he could find and that "Bakodys' actual building expenses were another question. I don't know . . . what they were in total. I never saw complete documents on any of that." See further testified:

> I saw some numbers that [plaintiff's attorney] had provided to me from his file; but . . . it was my determination that you couldn't identify specifically what items went to what costs. It appeared as though other projects had been combined into the accounting. Sometimes invoices would be for one address at Oakmont [sic] and include an address someplace else that he was bidding, and without being an accountant, I couldn't do an audit or wasn't going to do an audit of his accounting statements.

Frank Bakody testified that "some" of the documents in which he kept track of the subdivision costs had been lost and that he was unable to produce the documents at the time of trial. Barbara Bakody, Frank's wife and the only other shareholder of the Bakody corporation, testified that she was in charge of most of the financial records for the corporation. She further testified that "some" of the financial records for the project were lost or misplaced during several moves subsequent to the sale of the Oakmount Townhome property, although she stated that she had "some" of them.

As an element of a negligence cause of action, a plaintiff must prove damages with reasonable certainty. *Patterson v. Swarr, May, Smith & Anderson*, 238 Neb. 911, 473 N.W.2d 94 (1991). The nature and amount of damages cannot be sustained by evidence which is speculative and conjectural. *Nelson v. Dolan*, 230 Neb. 848, 434 N.W.2d 25 (1989).

As a matter of law, in the absence of evidence as to the actual costs of the Oakmount Townhome project, See's estimated costs of the project as well as an estimated profit margin resulted in a damage estimate that was speculative and conjectural.

It is evident, based upon See's testimony, that some of the cost records for the project were in the possession of Bakody's attorney. The record fails to reflect that any attempt was made to separate the costs of the Oakmount Townhome subdivision from the costs of Bakody's other building projects for the purpose of the present litigation.

Moreover, it could be inferred from the record that at least some of the actual cost records, such as for engineering and legal services, could have been obtained from the firms who did the work. As previously noted, Dorner, a member of the engineering firm which did the preliminary cost estimates of improvements to the subject property, testified for Bakody at trial. The Thompson firm's preliminary estimate of costs for constructing the improvements was entered into evidence. However, Dorner did not testify as to the actual engineering costs of the project, nor could he recall whether the actual costs of the project were consistent with the projected costs.

We note further that Thompson's preliminary estimate,

which included an estimate of its own engineering fees, projected the total costs of improvements to the property to be $96,685. See, using the Marshall Valuation Service figures, arrived at an estimated cost of $168,010 for improvements and $13,642 for engineering, for a total of $181,652, or nearly *twice* Thompson's preliminary cost estimate.

Thompson, in the same estimate, advised Bakody that "[t]ypically a subdivision can be graded for $350 to $400 per lot." Using the $400 per lot figure, the projected cost for grading 14 lots would have been $5,600. See, on the other hand, estimated the grading costs of the subdivision to be $33,977, again using the Marshall Valuation Service. This is more than *six times* the cost projected by Thompson.

Assuming but not deciding that the trial court correctly determined that the City breached its duty to Bakody and that the breach was the proximate cause of Bakody initiating construction on the project, the record is more than adequate to support the trial court's conclusion that reasonable minds could not differ that Bakody's evidence of its damages was based on speculation and conjecture and that Bakody had failed to adduce evidence of any damages with reasonable certainty. Therefore, the City was entitled to a directed verdict as a matter of law. Bakody's assignment of error to the contrary is without merit.

We further note that, although we do not find it necessary to analyze Bakody's other assignments of error, reasonable minds likewise could not differ that Bakody failed to adduce evidence of its damages with reasonable certainty as to the State, either on a negligence theory or a taking theory. Thus, Bakody's evidence of damages, as a matter of law, is also too speculative and conjectural to support an award of damages from the State.

CONCLUSION

Having fully considered Bakody's other assignments of error, and having found the above issues dispositive of the case, we affirm the trial court's entering of directed verdicts in favor of both the City and the State.

AFFIRMED.

CHARLES L. TERRY, APPELLANT, V. WALLACE E. DUFF, M.D., APPELLEE.

516 N.W.2d 591

Filed May 27, 1994. No. S-92-698.

1. **Rules of the Supreme Court: Records.** A bill of exceptions is required to have a court reporter's certificate immediately following the index in the first volume of the bill of exceptions.
2. _____: _____. If a bill of exceptions cannot be prepared and certified by a court reporter, it must be prepared under the direction of, and certified by, the trial judge.
3. _____: _____. The certified copy of the bill of exceptions must then be filed with the clerk of the district court.
4. _____: _____. Upon such filing with the clerk of the district court, the bill of exceptions then becomes the official bill of exceptions.
5. **Rules of the Supreme Court: Records: Time.** Once a bill of exceptions has been properly filed with the clerk of a district court, it is the duty of that clerk to file the bill of exceptions in the office of the Clerk of the Supreme Court within 5 days after a case has been placed on the Supreme Court's proposed call for argument, or at such earlier time as the Clerk of the Supreme Court may request.
6. **Records: Costs: New Trial: Appeal and Error.** It being the unquestionable duty of the clerk of a district court to present a bill of exceptions to the clerk of an appellate court, it is mandatory that the clerk maintain an accurate record of when a bill of exceptions is checked out and checked back in, and by whom. In this way, it can be determined who should pay the cost of a new trial when the bill of exceptions is missing through the fault of one of the parties.
7. **Records: Costs: New Trial: Evidence: Appeal and Error.** An appellate court should rely upon the record kept by the clerk of the district court in determining who pays new trial costs unless there is clear and convincing evidence that the clerk's record is in error.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Judgment vacated, and cause remanded for a new trial.

Michael J. Lehan, of Kelley & Lehan, P.C., and Ivory Griggs for appellant.

David D. Ernst, of Gaines, Mullen, Pansing & Hogan, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ.

FAHRNBRUCH, J.

Charles L. Terry appeals a jury verdict that disallowed his

medical malpractice claim against Wallace E. Duff, M.D. In his lawsuit, Terry alleged that Duff negligently performed sinus surgery upon him. The surgery was intended to relieve Terry's breathing difficulty.

We vacate the judgment of the district court for Douglas County and remand the cause for a new trial.

FACTS

In his March 7, 1990, petition, Terry alleged that, as a result of Duff's surgery, he suffers from (1) a total loss of smell, taste, and ability to blow his nose and clear his sinus; (2) headaches, nausea, diarrhea, inability to sleep, and work deterioration; and (3) total unemployability.

Duff answered, generally denying Terry's allegations of negligence. Following a trial and in accordance with the verdict of the jury, the trial court dismissed Terry's petition. Terry timely appealed to the Nebraska Court of Appeals. Under our authority to regulate the caseloads of the appellate courts of this state, we removed the matter to this court.

ASSIGNMENTS OF ERROR

On appeal, Terry alleges that the trial court erred in (1) allowing the jury to receive expert medical opinions based upon documents which were created by Duff and which did not have any of the traditional indicia of reliability accorded medical records; (2) giving a jury instruction which required the jury to find Duff negligent on all allegations before returning a verdict for Terry, and failing to give NJI2d Civ. 2.01 as requested; and (3) overruling Terry's motion for new trial.

ANALYSIS

We note at the outset that a proper bill of exceptions has never been filed with the Clerk of this court. The original bill of exceptions apparently was lost at some point after both appellant's counsel and appellee's counsel used it in preparation of their briefs.

The records of the clerk of the district court indicate that the record was checked out to appellant's counsel. However, it is agreed by both parties that appellant's counsel then transferred the record to appellee's counsel rather than checking the record

back into the clerk's office. Counsel for the appellee has now filed an affidavit in this court stating that an employee of that counsel's law firm believes he checked the record in to the clerk of the district court. The clerk of the district court has advised that, after a diligent search, the record cannot be found.

The parties have filed with the Clerk of this court a substituted "bill of exceptions" consisting of seven volumes of trial testimony and three volumes of duplicate exhibits. The duplicate bill has not been certified, nor has it been filed with the clerk of the district court. Moreover, the bill is incomplete because 11 of the original exhibits are missing. According to the parties, those 11 exhibits either cannot be located or cannot be duplicated.

A bill of exceptions is required to have a court reporter's certificate immediately following the index in the first volume of the bill of exceptions. See Neb. Ct. R. of Prac. 5F(2) (rev. 1992). If a bill of exceptions cannot be prepared and certified by a court reporter, it must be prepared under the direction of, and certified by, the trial judge. See Neb. Ct. R. of Prac. 5C(3) (rev. 1992). The certified copy of the bill of exceptions must then be filed with the clerk of the district court. See rule 5C(2). Upon such filing with the clerk of the district court, the bill of exceptions then becomes the official bill of exceptions. See rule 5C(4).

We have neither an official nor a complete bill of exceptions before this court. Because we are unable to determine with certainty whether it was through the fault of the office of the district court or one of the parties that a complete and proper bill of exceptions, including all exhibits, is unavailable to this court, we vacate the judgment of the district court and remand the cause to that court for a new trial.

We take this opportunity to remind all clerks of the district courts that once a bill of exceptions has been properly filed with the clerk of a district court, it is the duty of that clerk to "file the bill of exceptions in the office of the Clerk of the Supreme Court within 5 days after a case has been placed on the Supreme Court's proposed call for argument, or at such earlier time as the Clerk of the Supreme Court may request." Rule 5C(4).

It being the unquestionable duty of the clerk of a district

court to present a bill of exceptions to the clerk of an appellate court, it is mandatory that the clerk maintain an accurate record of when a bill of exceptions is checked out and checked back in, and by whom. In this way, it can be determined who should pay the cost of a new trial when the bill of exceptions is missing through the fault of one of the parties. An appellate court should rely upon the record kept by the clerk of the district court in determining who pays new trial costs unless there is clear and convincing evidence that the clerk's record is in error.

CONCLUSION

There being no official and complete bill of exceptions before this court, we vacate the judgment of the district court and remand this cause to the district court for a new trial.

JUDGMENT VACATED, AND CAUSE REMANDED FOR A NEW TRIAL.

SANDRA MASON, APPELLANT, V. MARTIN A. CANNON, APPELLEE.

516 N.W.2d 250

Filed May 27, 1994. No. S-92-840.

1. **Jurisdiction: Appeal and Error.** It is not only within the power but the duty of an appellate court to determine whether the appellate court has jurisdiction over the matter before it.
2. **Motions for New Trial: Time: Appeal and Error.** The time for filing an appeal cannot be extended by successive filings of motions for new trial.
3. **Motions to Vacate: Motions for New Trial: Time.** A motion to vacate filed within 10 days of the order of dismissal is the equivalent of the filing of a motion for new trial.
4. **Jurisdiction: Final Orders: Motions for New Trial: Time: Appeal and Error.** In order to vest an appellate court with jurisdiction, the notice of appeal must be filed within 30 days of the entry of the final order or the overruling of a motion for new trial.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Appeal dismissed.

Robert Wm. Chapin, Jr., for appellant.

Kile W. Johnson, of Barlow, Johnson, Flodman, Sutter, Guenzel & Eske, for appellee.

HASTINGS, C.J., WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ.

WRIGHT, J.

Sandra Mason commenced a legal malpractice action in 1988. The case was dismissed after the district court issued a third order to show cause why the case should not be dismissed for want of prosecution.

FACTS

On September 26, 1988, Mason filed a petition in the district court for Lancaster County, alleging a cause of action for legal malpractice against Martin A. Cannon. On November 21, 1989, the court ordered that cause be shown by affidavit on or before December 21 why the case should not be dismissed for want of prosecution. On May 28, 1991, the court again ordered that cause be shown by affidavit why the case should not be dismissed for want of prosecution, and on June 28, the case was dismissed for the first time for want of prosecution. A motion to reinstate was granted, and on October 4, the court ordered that trial notice be filed within 120 days.

On May 19, 1992, the court entered an order to show cause by affidavit on or before June 18 why the case should not be dismissed for want of prosecution. The court dismissed the case on June 3. The docket entry stated: "Trial notice has not been filed. Case is dismissed for want of prosecution." In response, Mason filed a pleading captioned "Motion to Vacate Dismissal Order of June 3, 1992." A docket entry shows that the motion to vacate was overruled on June 22.

On June 26, 1992, Mason filed a "Motion for New Trial/Removal from Dismissal Docket," requesting that the court set aside and vacate the order entered on June 22 or, in the alternative, remove the matter from the dismissal docket. On August 21, the court overruled the motion for new trial, and on September 21, Mason filed a notice of appeal from the August 21 order.

ANALYSIS

"[I]t is not only within the power but the duty of an appellate court to determine whether the appellate court has jurisdiction over the matter before it." *Rohde v. Farmers Alliance Mut. Ins. Co.*, 244 Neb. 863, 868, 509 N.W.2d 618, 623 (1994). Accord, *Riley v. State*, 244 Neb. 250, 506 N.W.2d 45 (1993); *In re Interest of D.M.B.*, 240 Neb. 349, 481 N.W.2d 905 (1992). The time for filing an appeal cannot be extended by successive filings of motions for new trial. *Abboud v. Cutler*, 238 Neb. 177, 469 N.W.2d 763 (1991).

The problem in this case is that Mason did not file a timely notice of appeal. On June 3, 1992, trial notice had not been filed, and the court ordered the case dismissed for want of prosecution. Mason did not appeal from this order. Instead, on June 5, she filed a motion to set the matter for trial and a motion to vacate the order of dismissal. A motion to vacate filed within 10 days of the order of dismissal is the equivalent of the filing of a motion for new trial. See *id.* The motion to vacate was overruled on June 22.

Pursuant to Neb. Rev. Stat. § 25-1912 (Cum. Supp. 1992), a notice of appeal must be filed within 30 days after the rendition of the judgment, decree, or final order. Thus, the order overruling the motion to vacate, which is a final order, would require the filing of a notice of appeal within 30 days of June 22, 1992. Instead, Mason filed another motion for new trial, dated June 26, 1992. Because the time for filing an appeal cannot be extended by successive motions for new trial, Mason's notice of appeal was not timely. See *Abboud, supra.*

The June 3, 1992, order of dismissal was a final, appealable order. It was an order which affected a substantial right, determined the action, and prevented a judgment. See *Rohde, supra.* In order to vest an appellate court with jurisdiction, the notice of appeal must be filed within 30 days of the entry of the final order or the overruling of a timely filed motion for new trial. *In re Interest of C.M.H. and M.S.H.*, 227 Neb. 446, 418 N.W.2d 226 (1988).

Mason's "Motion for New Trial/Removal from Dismissal Docket," filed June 26, 1992, requested that the court set aside and vacate its order entered June 22 or, in the alternative,

remove the matter from the dismissal docket for the following reasons:

> 1. Irregularity in the proceedings of the court . . . by which [Mason] was prevented from having a fair trial.
>
> 2. . . . [T]he verdict . . . is not sustained by sufficient evidence . . . .
>
> 3. . . . [E]rror of law occurr[ed] at the trial . . . .
>
> 4. Error of the Court by not recognizing that the delays . . . were cause[d] by [Cannon].
>
> 5. Error of the Court by not recognizing that [Mason] attempted to set this matter for trial in October and that [Cannon] requested additional time to conduct discovery.
>
> 6. Error by the Court in not taking judicial notice of the Court record which indicated that [Mason] was complying with the Court's earlier Order to allow [Cannon] to take the deposition of [Mason's] expert witness . . . .

The June 26, 1992, motion did not toll the time for filing an appeal within 30 days of the June 22 order overruling Mason's motion to vacate. The June 26 motion requested that the court vacate the June 22 order. Even if the court had vacated the June 22 order, the case was still dismissed by the June 3 order, which dismissed the case for want of prosecution. The request to vacate the June 22 order was not a motion for new trial because the June 22 order simply overruled the motion to vacate filed by Mason on June 5.

Even if the June 26, 1992, motion was considered as a motion for a new trial, the time for filing an appeal cannot be extended by successive filings of motions for new trial. See *Abboud, supra*. An untimely motion for new trial is ineffectual, does not toll the time for perfection of an appeal, and does not extend or suspend the time limit for filing a notice of appeal. *Metrejean v. Gunter*, 240 Neb. 166, 481 N.W.2d 176 (1992). The filing of a motion for new trial and its subsequent overruling do not convert an otherwise unappealable order into an appealable order. *Jarrett v. Eichler*, 244 Neb. 310, 506 N.W.2d 682 (1993). The August 21 order which overruled the June 26 motion was not an appealable order.

The June 3, 1992, order dismissed the case for want of

prosecution. Mason's motion to vacate, filed on June 5, was overruled on June 22, and Mason did not appeal from such order within 30 days.

The appeal is dismissed for lack of jurisdiction.

APPEAL DISMISSED.

BOSLAUGH, J., participating on briefs.

RANDY L. BARTUNEK, APPELLANT, V. MICHAEL J. GENTRUP, APPELLEE.

516 N.W.2d 253

Filed May 27, 1994. No. S-92-875.

1. **Appeal and Error.** Regarding a question of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review.
2. **Costs.** The costs of litigation and expenses incident to litigation may not be recovered unless provided for by a statute or a uniform course of procedure.
3. **Expert Witnesses: Fees.** A witness who testifies as an expert on a subject requiring special knowledge and skill is, in the absence of a contract for those services, entitled only to the statutory witness fee.

Appeal from the District Court for Cuming County: ROBERT B. ENSZ, Judge. Affirmed.

William G. Line, of Kerrigan & Line, for appellant.

Thomas J. Culhane and Ruth W. Beyerhelm, of Erickson & Sederstrom, P.C., for appellee.

HASTINGS, C.J., WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ.

WRIGHT, J.

Randy L. Bartunek obtained a judgment against Michael J. Gentrup for injuries Bartunek suffered as the result of a motor vehicle accident. The jury returned a verdict in favor of Bartunek in the amount of $45,000. Bartunek moved for taxation of costs and expenses against Gentrup in the amount of $6,138. The trial court allowed only a portion of the costs, and Bartunek appeals.

SCOPE OF REVIEW

Regarding a question of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review. *Jasa v. Douglas County*, 244 Neb. 944, 510 N.W.2d 281 (1994).

FACTS

On January 12, 1991, Bartunek was a passenger in a vehicle which collided with a vehicle driven by Gentrup. Bartunek sustained injuries including a dislocated and fractured shoulder, a punctured lung, a torn ear, and a fractured foot. He sought compensation for medical bills in the amount of $13,706, lost earnings in the amount of $7,305, and loss of personal property in the amount of $675. The jury returned a verdict in favor of Bartunek in the amount of $45,000, and the trial court entered judgment for that amount. The trial court ordered that the amount of costs would be determined on Bartunek's motion for taxation of costs.

For his assignments of error, Bartunek has enumerated each of the following costs, and he assigns as error the trial court's refusal to tax such costs:

Copy of Bartunek's deposition taken by Gentrup	$ 76.70
Copies of depositions of a Dr. McKnight and Bartunek's wife, Nancy Bartunek, both taken by Gentrup	108.80
Copy of deposition of Dr. Harold Smith taken by Gentrup	46.80
Copy of video deposition of Dr. Timothy Fitzgibbons, Gentrup's expert, taken by Gentrup	15.00
Copy of transcript of Dr. Fitzgibbons' deposition	64.10
Expert witness fee of Dr. Jerome Sherman for projection of Bartunek's economic loss, including trial testimony and mileage	1,030.00
James Rogers, Midlands Rehabilitation Consultants, Bartunek's expert for testimony	

concerning jobs that Bartunek could and could not perform	1,067.65
Karen Brown, Working Back Institute, Bartunek's expert on work capacity evaluation	680.00
Dr. Richard Bergstrom trial testimony as Bartunek's expert	1,800.00
Deposition of Dr. Donald Gammel, Gentrup's expert, taken by Bartunek	300.00
TOTAL COSTS	$5,189.05

ANALYSIS

As a general rule, the costs of litigation and expenses incident to litigation may not be recovered unless provided for by a statute or a uniform course of procedure. *Kliment v. National Farms, Inc.*, 245 Neb. 596, 514 N.W.2d 315 (1994); *Gottsch Feeding Corp. v. Red Cloud Cattle Co.*, 229 Neb. 746, 429 N.W.2d 328 (1988).

We first dispose of assignments of error Nos. 1 through 5, which deal with the costs for copies of depositions taken by Gentrup. Bartunek has not cited or referred to a statute or a uniform course of procedure which would support his claim for these costs. See *id.* Assignments of error Nos. 1 through 5 are without merit.

Assignments of error Nos. 6 through 9 deal with expert witness fees charged by Bartunek's witnesses. Dr. Jerome Sherman testified concerning a projection of the economic loss suffered by Bartunek. Dr. Sherman relied upon a report by James Rogers, a rehabilitation specialist, who provided a vocational evaluation. Rogers had referred Bartunek to Karen Brown for an evaluation of Bartunek's lifting ability and other physical capabilities. Dr. Richard Bergstrom detailed Bartunek's injuries, which are described above.

Bartunek relies upon *Nat. Bank of Commerce Trust & Savings Assn. v. Rhodes*, 207 Neb. 44, 295 N.W.2d 711 (1980). In that case, we affirmed an award of costs to the plaintiff which included an expert witness fee in the amount of $1,000. The plaintiff requested costs in excess of $83,000. Since

Rhodes, we have adhered to the policy that the costs of litigation and expenses incident to litigation may not be recovered unless provided for by a statute or a uniform course of procedure. *Kliment, supra*; *Gottsch Feeding Corp., supra*.

In *Hefti v. Hefti*, 166 Neb. 181, 88 N.W.2d 231 (1958), we stated that expert witness fees could be taxed above the statutory fee where a special contract existed. In *Lockwood v. Lockwood*, 205 Neb. 818, 821, 290 N.W.2d 636, 639 (1980), we held that "a witness who testifies as an expert on a subject requiring special knowledge and skill is, in the absence of a contract for those services, entitled only to the statutory witness fee." In *Vredeveld v. Clark*, 244 Neb. 46, 504 N.W.2d 292 (1993), a tort action for damages, we held that the court did not err in refusing to tax expert witness fees to the defendant. We distinguished *Hefti* and *Lockwood*, which were actions for dissolution of marriage. In *Hefti* and *Lockwood*, costs for expert witness fees were allowed pursuant to Neb. Rev. Stat. § 42-367 (Reissue 1988) and its predecessor, which permitted a court to direct costs against either party involved in a divorce action.

Were we to tax as costs the expert witness fees charged by a defendant's experts, the result would create a chilling effect on a plaintiff's right to seek relief for injury or wrong because of the possibility that all expert witness fees of the defendant would be taxed against the plaintiff, should the defendant prevail. The same result could occur with a defendant who would be required to pay the plaintiff's expert witness fees, which could be greatly in excess of the monetary relief sought by the plaintiff. The costs of litigation and the expenses incident to litigation may not be recovered unless provided for by a statute or a uniform course of procedure. *Kliment, supra*; *Gottsch Feeding Corp., supra*. Bartunek's assignments of error Nos. 6 through 9 are without merit.

Bartunek's final assignment of error is that the court erred in failing to allow as a cost the $300 fee charged to Bartunek for the deposition of Dr. Donald Gammel which was taken by Bartunek's counsel. Neb. Ct. R. of Discovery 26(b)(4)(C)(i) and (ii) (rev. 1992) require the plaintiff to pay the defendant's expert a reasonable fee for the time spent responding to

discovery. Dr. Gammel, director of occupational medicine for Immanuel Medical Center in Omaha, testified as a defense witness on disability evaluation.

We have not previously decided whether a fee required to be paid pursuant to rule 26 should be taxed as costs. Cases cited by Bartunek address the costs of taking the deposition of a witness. The taxing of Gammel's fee as a cost is not provided for by statute or a uniform course of procedure. This assignment of error is without merit.

The trial court did not abuse its discretion in awarding costs. The judgment of the trial court is affirmed.

AFFIRMED.

BOSLAUGH, J., participating on briefs.

RICHARD ROBISON, DOING BUSINESS AS ROBISON CONSTRUCTION, APPELLANT, V. ROLAND CRAIG MADSEN AND THERESA ANN MADSEN, HUSBAND AND WIFE, AND NORWEST BANK NEBRASKA, APPELLEES.

516 N.W.2d 594

Filed May 27, 1994. No. S-92-948.

1. **Mechanics' Liens: Foreclosure: Equity.** An action to foreclose a construction lien is one grounded in equity.
2. **Equity: Appeal and Error.** In an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Equity: Motions to Dismiss.** When a defendant in an equity action moves to dismiss the plaintiff's action at the close of the plaintiff's evidence, the defendant, for the purposes of considering the defendant's motion, admits the truth of the plaintiff's evidence and testimony, together with every inference which may fairly and reasonably be drawn therefrom. The court must then determine, as a question of law, whether the plaintiff's evidence has made a prima facie case.
4. **Motions for New Trial: Appeal and Error.** A district court's denial of a motion for new trial will be affirmed when the court's decision is neither erroneously

prejudicial nor an abuse of discretion.

5. **Trial: Appeal and Error.** An issue not presented to or passed upon by the trial court generally is not appropriate for consideration on appeal.
6. **Pleadings: Appeal and Error.** An appellate court is obliged to dispose of cases on the basis of the theory presented by the pleadings on which the case was tried.
7. **Mechanics' Liens: Contracts.** Under contracts designed as "cost plus" agreements, the amount owing the builder should be computed on the basis of the amount actually spent for labor, materials, and supplies which go into and become a part of the finished structure, including the amounts paid to subcontractors.
8. **Mechanics' Liens: Proof.** The burden of proof is upon one claiming a mechanic's or construction lien to show that the material furnished by him was used in the construction of the building.
9. **Pleadings: Evidence: Waiver: Words and Phrases.** A judicial admission is a formal act done in the course of judicial proceedings which is a substitute for evidence, thereby waiving or dispensing with the production of evidence by conceding for the purpose of litigation that the proposition of fact alleged by the opponent is true.
10. **Pleadings.** An admission in an answer does not extend beyond the intendment of the admission as clearly disclosed by its context.
11. **Trial.** A trial judge has broad discretion over the conduct of a trial.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Affirmed.

Terrance A. Poppe and Joel G. Lonowski, of Hecht, Sweet, Morrow, Poppe & Otte, P.C., for appellant.

William J. Morris and Jim R. Titus, of Nelson Morris Holdeman & Titus, for appellees Madsen.

HASTINGS, C.J., BOSLAUGH, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ.

PER CURIAM.

After Richard Robison, doing business as Robison Construction, presented evidence and rested in his residential construction lien foreclosure action, the trial court, on motion of the residence's owners, dismissed Robison's case because he had failed to prove the amount of his lien.

We affirm the dismissal by the district court for Lancaster County.

ASSIGNMENTS OF ERROR

Robison claims that the trial court erred in (1) sustaining the

owners' motion to dismiss on grounds of insufficient evidence of the actual cost of constructing a residence for its owners and (2) overruling Robison's motion for new trial.

STANDARD OF REVIEW

An action to foreclose a construction lien is one grounded in equity. *Lange Indus. v. Hallam Grain Co.*, 244 Neb. 465, 507 N.W.2d 465 (1993). In an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Id.*

When a defendant in an equity action moves to dismiss the plaintiff's action at the close of the plaintiff's evidence, the defendant, for the purposes of considering the defendant's motion, admits the truth of the plaintiff's evidence and testimony, together with every inference which may fairly and reasonably be drawn therefrom. The court must then determine, as a question of law, whether the plaintiff's evidence has made a prima facie case. *Schall v. Anderson's Implement*, 240 Neb. 658, 484 N.W.2d 86 (1992).

A district court's denial of a motion for new trial will be affirmed when the court's decision is neither erroneously prejudicial nor an abuse of discretion. See *Goeke v. National Farms, Inc.*, 245 Neb. 262, 512 N.W.2d 626 (1994).

FACTS

On May 8, 1990, Roland Craig Madsen and Theresa Ann Madsen, by written contract, agreed to pay Robison the actual direct cost of the construction of a residence in the city of Lincoln's subdivision of Williamsburg Village, plus 10 percent for overhead and profit. The contract set forth an *estimated* total cost of $191,966, but established the contract price as "the sum of actual direct construction cost plus ten percent for overhead and profit for the construction to be performed by Contractor [Robison]."

When the Madsens failed to pay the unpaid balance of what

Robison claimed was due him, Robison filed a construction lien and subsequently filed this action in the district court for Lancaster County.

The contract defined direct construction cost as "all costs to complete the Project in accordance with the plans and specifications." Attached to the contract was an 11-page, detailed list of specifications, which both Robison and Roland Madsen signed. Also entered into evidence were copies of plans for the construction of the Madsens' residence, which Robison testified were the plans referred to in the contract.

Robison began construction of the home in May 1990. As work progressed, Robison prepared and sent to the Madsens monthly statements showing his calculations of the construction costs incurred to the date of each statement. Robison testified that he based these calculations on invoices sent to him by subcontractors and the costs of labor performed by his own employees.

Robison testified that after the residence was substantially completed in late September 1990, he and Roland Madsen walked through the house and made a "punch list" of the items Madsen thought should be corrected. Robison testified that he corrected most of the items on that list in October.

Up to that time, the Madsens apparently had paid the monthly statements Robison sent them. Robison testified that in mid-October, Roland Madsen paid him $16,478 on the September bill but refused to pay the remaining balance. Robison testified that he then stopped working on the residence. He subsequently filed a construction lien against the property to secure the unpaid balance, which Robison claimed was $61,101.22 at that time. On March 5, 1991, Robison filed a petition to foreclose the construction lien in the district court for Lancaster County.

In their answer, the Madsens admitted that they had entered into the contract dated May 8, 1990. They also asserted as affirmative defenses that they had been induced to enter into the contract by fraudulent misrepresentations and that Robison had failed to construct the house in a good and workmanlike manner.

At trial, Robison claimed that the Madsens owed him

$61,101.22, plus subsequent finance charges for a total of $71,756.21. At the close of Robison's case, the district court granted the Madsens' motion to dismiss Robison's petition on grounds of insufficient evidence of the actual cost of constructing the Madsens' residence. Robison then filed a motion for new trial, which the district court overruled. Robison appealed to the Nebraska Court of Appeals. Under our authority to regulate the caseloads of the appellate courts of this state, we removed the matter to this court.

ANALYSIS

To dispose of this appeal, we need only address Robison's first assignment of error that the district court erred in dismissing Robison's petition on the ground of insufficient evidence of the actual direct construction cost. In connection therewith, we must also address Robison's claim that a statement contained in the Madsens' answer was a judicial admission.

In their answer, the Madsens alleged for their first affirmative defense that Robison had quoted the Madsens various estimates of construction costs, that Robison had made material representations of fact that were false or made with reckless disregard for their truth or falsity, and that the Madsens had relied on these representations in entering into the contract. As part of this allegation, the Madsens also stated:

> [T]he amount set forth in the April 30, 1990 estimate was in the amount of $186,798 and *the contracted amount was in the amount of $191,966*; and the variance between said sums arose because of the failure of the Plaintiff to include certain items in preparing said amount and the Defendants were aware of this variance and asserted [sic] to the variance by executing the contract.

(Emphasis supplied.)

Robison claimed, at the hearing on his motion for new trial and on appeal, that by making this assertion in their answer, the Madsens made a judicial admission that the contract established a *minimum* price of $191,966. Robison argues that because the Madsens admitted a minimum contract price in their answer, he did not have to produce evidence of the

contract price at trial. Therefore, he argues that he is entitled to at least $34,287.13, which is the difference between Robison's alleged minimum price of $191,966 and the amount the Madsens paid, $157,678.87.

Robison did not advance this theory of a minimum contract price in his pleadings or at trial. His petition alleges that the amount due under the contract was $61,101.22 and that this amount represented the actual direct construction cost, plus 10 percent for overhead and profit, less the amount paid by the Madsens. He did not claim in his petition that he was owed any minimum amount.

The record fails to reflect that Robison claimed at trial that the contract established a minimum price. Throughout Robison's testimony at trial, he consistently characterized the contract price as the actual direct cost of constructing the residence plus 10 percent, regardless of whether that amount turned out to be more or less than the estimate of $191,966 set forth in the contract.

Robison raised this argument only after the district court determined that Robison had failed to produce sufficient evidence of the actual direct construction cost and dismissed Robison's case. The time to have raised this theory of a minimum price was not on a motion for new trial or in this court on appeal. See *Ford v. County of Perkins*, 190 Neb. 304, 207 N.W.2d 694 (1973).

An issue not presented to or passed upon by the trial court generally is not appropriate for consideration on appeal. *How v. Mars*, 245 Neb. 420, 513 N.W.2d 511 (1994). An appellate court is obliged to dispose of a case on the basis of the theory presented by the pleadings on which the case was tried. *Central States Resources v. First Nat. Bank*, 243 Neb. 538, 501 N.W.2d 271 (1993). Cases are determined in an appellate court on the theory upon which they were tried. *Vejraska v. Pumphrey*, 241 Neb. 321, 488 N.W.2d 514 (1992).

Upon a de novo review of this cause on the theory upon which it was tried, we find that the district court did not err in dismissing Robison's petition for lack of sufficient evidence.

Under contracts designed as "cost plus" agreements, the amount owing the builder should be computed on the basis of

the amount actually spent for labor, materials, and supplies which go into and become a part of the finished structure, including the amounts paid to subcontractors. *LaPuzza v. Prom Town House Motor Inn, Inc.*, 191 Neb. 687, 217 N.W.2d 472 (1974). The burden of proof is upon one claiming a mechanic's or construction lien to show that the material furnished by him was used in the construction of the building. See *Lofholm v. Stoltenberg*, 178 Neb. 318, 133 N.W.2d 387 (1965).

In this case, the contract defined actual direct construction costs as those costs incurred in completing the Madsens' house according to plans and specifications. To prove the actual direct construction cost, Robison offered statements that he compiled from his subcontractors' invoices and his own employees' labor charges. With regard to the invoices, Robison testified that neither he nor his employees verified that the items on the invoices had been installed in the Madsens' residence or that the work on the invoices had been performed. Robison testified that he had reviewed the invoices generally for accuracy, but that it was possible he had billed the Madsens for items they did not receive. Given this testimony, we find that Robison failed to meet his burden of proving that the material and labor for which he charged the Madsens went into, and became a part of, the finished structure, and therefore, Robison failed to provide sufficient evidence of the actual direct construction costs for completing the house according to plans and specifications.

Even if Robison had advanced his theory of a minimum contract price at trial, his argument would fail because the allegation at issue in the Madsens' answer was not a judicial admission.

A judicial admission is a formal act done in the course of judicial proceedings which is a substitute for evidence, thereby waiving or dispensing with the production of evidence by conceding for the purpose of litigation that the proposition of fact alleged by the opponent is true. See, *Lange Building & Farm Supply, Inc. v. Open Circle "R", Inc.*, 210 Neb. 201, 313 N.W.2d 645 (1981); *Sempek v. Sempek*, 198 Neb. 300, 252 N.W.2d 284 (1977).

Judicial admissions must be unequivocal. See *Modern*

Plumbing & Heating, Inc. v. Journey West Campground, Inc., 193 Neb. 781, 229 N.W.2d 192 (1975). See, also, *Field v. Aim Management Group, Inc.*, 845 S.W.2d 469 (Tex. Civ. App. 1993) (judicial admission must be deliberate, clear, and unequivocal); *Arpac Corp. v. Murray*, 226 Ill. App. 3d 65, 589 N.E.2d 640 (1992) (judicial admission is any admission contained in original verified pleading which is not the product of mistake or inadvertence). This court has further stated that an admission in an answer does not extend beyond the intendment of the admission *as clearly disclosed by its context*. See, *O'Neal v. First Trust Co.*, 160 Neb. 469, 70 N.W.2d 466 (1955); *Barry v. Barry*, 147 Neb. 1067, 26 N.W.2d 1 (1947).

The statement at issue in the Madsens' answer appears in the context of allegations regarding the various *estimates* proffered by Robison. The specific reference to $191,966 clearly refers to the estimated cost set forth on the first page of the written contract. The intent of this statement, as clearly disclosed by its context, was not to admit that the contract established a minimum price, but simply to allege what the parties had agreed to as the estimated cost in the written contract. The statement in the Madsens' answer is not an unequivocal admission that the contract established a minimum price of $191,966. This is particularly true because the contract itself states in plain language that the contract price is the actual direct construction cost plus 10 percent.

Furthermore, even if the Madsens had unequivocally admitted in their answer that the contract established a minimum price, Robison could not bind the Madsens to it when Robison never relied on the admission and, in fact, produced evidence to the contrary. See, *Collision Center Paint & Body v. Campbell*, 773 S.W.2d 354 (Tex. Civ. App. 1989) (a party waives the right to rely on opponent's admission unless objection is made to the introduction of evidence contrary to those admissions); *Jenni v. Gamel*, 602 S.W.2d 696 (Mo. App. 1980) (admission in pleading is not binding upon party where opponent does not rely upon the admission, but, rather, introduces evidence to the contrary). See, also, 31A C.J.S. *Evidence* § 381 c. (1964).

As already noted, Robison testified throughout the trial that

the contract obligated the Madsens to pay, not a minimum price, but the actual direct construction costs plus 10 percent. He also introduced the contract into evidence to establish, at least in part, that the contract was a "cost plus" contract. Therefore, Robison could not bind the Madsens to an admission he never relied upon and, in fact, contradicted during trial.

Finally, we must comment upon the trial court's use of stopwatches to keep track of each party's allotted time. The court apparently allowed each party 10½ hours to present his or their case, including cross-examination and arguments on objections, and used stopwatches to monitor the amount of time that had been used by each side. It is undisputed that a trial judge has broad discretion over the conduct of a trial. *Yopp v. Batt*, 237 Neb. 779, 467 N.W.2d 868 (1991). In this case, the parties have not suggested, nor have we found, that the district court abused its discretion by unduly limiting the parties' presentation of evidence with the use of stopwatches. However, we caution trial courts against the use of stopwatches or other similar limitations on time. Such methods of controlling the course of trial might well overly restrict the presentation of evidence and could prejudice a party's right to fully present that party's case.

CONCLUSION

Upon de novo review of the record, we find no merit to Robison's argument that the Madsens made a judicial admission as to a minimum contract price of $191,966. Treating as admitted the truth of all relevant evidence favorable to Robison and giving Robison the benefit of all permissible inferences deducible from the properly admitted evidence, we further find from our de novo review of the record that Robison failed to produce sufficient evidence to establish a prima facie case of the amount owed him. The district court's denial of Robison's motion for new trial was neither erroneously prejudicial nor an abuse of discretion. Therefore, the decision of the district court is affirmed.

AFFIRMED.

WHITE, J., participating on briefs.

JEAN-DANIELE REICHERT, APPELLEE, V. RICKEY MURL REICHERT, APPELLANT.

516 N.W.2d 600

Filed May 27, 1994. No. S-92-979.

1. **Divorce: Property Division: Alimony: Attorney Fees: Appeal and Error.** In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge. This standard of review applies to the trial court's determinations regarding division of property, alimony, and attorney fees.
2. **Evidence: Appeal and Error.** In conducting de novo review, when evidence is in conflict, an appellate court considers, and may give weight to, the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Property Division.** The marital estate includes property accumulated and acquired during the marriage through the joint efforts of the parties.
4. _____. With some exceptions, the marital estate does not include property acquired by one of the parties through gift or inheritance.
5. **Property Division: Pensions.** Military pensions are included in the marital estate.
6. _____: _____. The marital estate includes only that portion of a pension which is earned during the marriage.
7. **Property Division.** Though generally a division of one-third to one-half of the marital estate is appropriate, property divisions are not subject to any rigid mathematical formula.
8. _____. In determining the appropriateness of a division of marital property, the ultimate test is one of reasonableness.
9. **Property Division: Alimony.** In dividing property upon a dissolution of marriage and in determining alimony, a court should consider four factors: (1) the circumstances of the parties; (2) the duration of the marriage; (3) the history of contributions to the marriage, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities; and (4) the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party.
10. **Alimony.** The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances make it appropriate. Alimony should not be used to equalize the incomes of the parties or to punish one of the parties.
11. _____. In determining whether alimony should be awarded, a court should consider what effect, if any, the marriage had on the ability of the wife to secure gainful employment in the future and the earning capacity of the husband.
12. **Property Division: Alimony.** As with a division of property, the ultimate test for an award of alimony is one of reasonableness.
13. **Alimony.** When a spouse sacrifices seniority for the sake of a marriage, a court may consider that loss of seniority as favoring an award of alimony.

14. **Divorce: Attorney Fees.** In dissolution proceedings, an award of attorney fees depends on a variety of factors, including the amount of property and alimony awarded, the earning capacity of the parties, and the general equities of the situation.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Affirmed as modified.

Carl I. Klekers for appellant.

Donald A. Roberts, of Lustgarten & Roberts, P.C., for appellee.

HASTINGS, C.J., BOSLAUGH, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ.

PER CURIAM.

Rickey Murl Reichert (husband) appeals from a decree of dissolution. We affirm as modified.

In 1972, the parties were married in Gibraltar. In 1992, Jean-Daniele Reichert (wife) filed a petition for dissolution of the marriage. No children were born of the marriage.

After a trial, the district court entered its decree of dissolution. By way of property division, the court awarded to husband a pickup truck and other personal property. The court awarded to wife a Jeep, other personal property, and the marital residence. In addition, the court awarded wife $335 per month from husband's military pension and $1,000 in insurance proceeds to repair the garage roof. The court evenly divided the savings account used by husband, 43 savings bonds, and husband's thrift savings account. As alimony, the court awarded wife $300 per month for 120 months. As attorney fees, the court awarded wife $500, in addition to the $250 attorney fees it had awarded in an earlier temporary order.

Husband appealed, and under our authority to regulate the caseloads of the appellate courts of this state, we removed the matter to this court. Husband alleges that the district court erred in awarding wife (1) an inequitable amount of the property, (2) alimony, and (3) attorney fees.

In actions for dissolution of marriage, an appellate court reviews the case de novo on the record to determine whether there has been an abuse of discretion by the trial judge.

Pendleton v. Pendleton, 242 Neb. 675, 496 N.W.2d 499 (1993); *McWha v. McWha*, 241 Neb. 355, 488 N.W.2d 357 (1992); *Stover v. Stover*, 240 Neb. 391, 482 N.W.2d 244 (1992). In conducting such de novo review, when evidence is in conflict, an appellate court considers, and may give weight to, the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another. *McWha, supra*; *Stover, supra*. This standard of review applies to the trial court's determinations regarding division of property, alimony, and attorney fees. See, *Preston v. Preston*, 241 Neb. 181, 486 N.W.2d 902 (1992) (property division, attorney fees); *Larimore v. Larimore*, 240 Neb. 13, 480 N.W.2d 192 (1992) (property division); *Ziebarth v. Ziebarth*, 238 Neb. 545, 471 N.W.2d 450 (1991) (alimony, attorney fees); *Murrell v. Murrell*, 232 Neb. 247, 440 N.W.2d 237 (1989) (alimony).

Husband first asserts that the trial court inequitably divided the property. Specifically, husband argues that the trial court erred in awarding wife one-half of his savings account, the $1,000 insurance check, and one-half of the 43 savings bonds because, he claims, those items do not exist.

There being no settlement agreement between the parties, the trial court was obliged to order an equitable division of the marital estate. Neb. Rev. Stat. § 42-366(8) (Reissue 1988). The marital estate includes property accumulated and acquired during the marriage through the joint efforts of the parties. See, *Grummert v. Grummert*, 195 Neb. 148, 237 N.W.2d 126 (1975); *Tavlin v. Tavlin*, 194 Neb. 98, 230 N.W.2d 108 (1975); *Jablonski v. Jablonski*, 173 Neb. 544, 114 N.W.2d 1 (1962). With some exceptions not relevant here, the marital estate does not include property acquired by one of the parties through gift or inheritance. See, *Preston, supra*; *Buche v. Buche*, 228 Neb. 624, 423 N.W.2d 488 (1988); *Sullivan v. Sullivan*, 223 Neb. 273, 388 N.W.2d 516 (1986).

In the present action, the marital estate indisputably includes the family residence, a pickup truck, a Jeep, a thrift savings account, husband's military pension, and assorted items of tangible personal property. The disputed items are a savings account, an insurance check, and some savings bonds. Husband's argument regarding these disputed items amounts to

a claim that the marital estate does not include these items. We address each disputed item in turn, reserving for the moment the question of whether the items were equitably divided.

The trial court awarded wife "one-half of the savings account used by [husband], which one-half equals $300.00." There is no evidence of such an account. The trial court erred in considering such a savings account as part of the marital estate and awarding a portion thereof to wife. The decree should be modified by striking out this award.

The trial court awarded wife "the $1,000.00 insurance check . . . but if the same is not in existence, [husband] shall pay to [wife] the sum of $1,000.00." Wife testified that the garage roof was damaged 2 years ago, that the damage was covered by insurance, and that the insurance company sent a check for approximately $1,000, which husband appropriated. Wife further testified that the damage has not been repaired. Husband did not dispute the existence of the check. Husband instead testified that he had repaired the garage roof several times and that he thought it no longer leaked.

The trial court clearly determined that the insurance check existed and was kept by the husband. The check was a part of the marital estate because it was property accumulated during the marriage through the parties' joint ownership of the house. The court did not err in considering the insurance check a part of the marital estate.

The trial court awarded wife "one-half of the value of the 43 savings bonds owned by the parties." Wife testified that, for 20 years, she and her husband regularly purchased savings bonds. On the list of assets which she entered into evidence, wife claimed 43 savings bonds with a total value of $4,300. When asked why she had listed 43 bonds, wife testified that those were the only ones she could find and that to her knowledge, they still exist. Husband testified that after he had been served with notice of the dissolution action, he had used a number of savings bonds to license and register the pickup truck; according to husband, there were only six or seven bonds left. Husband also testified that the type of bonds he purchased could not be cashed for 6 months, that their prematurity cash value was $50, and that their value upon maturity was $100.

The trial court clearly determined that 43 savings bonds existed. Because the testimony of husband and wife directly conflicted on this point, we choose to give weight to the fact that the trial court observed the witnesses and believed one version of the facts rather than another. Accordingly, the trial court did not err in including the 43 savings bonds as part of the marital estate. However, the trial court made no finding as to the value of the bonds. Because there was no evidence that any of the bonds had matured, we find that the bonds each had a value of $50. The decree should be modified to reflect this valuation.

Finally, husband's military pension remains to be addressed. It is undisputed that the military pension is included in the marital estate. See § 42-366(8). See, also, *Ray v. Ray*, 222 Neb. 324, 383 N.W.2d 752 (1986); *Rockwood v. Rockwood*, 219 Neb. 21, 360 N.W.2d 497 (1985); *Taylor v. Taylor*, 217 Neb. 409, 348 N.W.2d 887 (1984). The question is how much of the pension plan should be included. We have addressed this question only obliquely in *Hildebrand v. Hildebrand*, 239 Neb. 605, 477 N.W.2d 1 (1991).

In *Hildebrand*, the parties were married to each other twice. The first marriage was dissolved in Alaska. The second marriage was dissolved in Nebraska. During the second dissolution, the wife argued that she had a right to her husband's pension based on the total years of marriage. Rejecting this argument, we held that the wife's rights extended only to the portion of the pension earned during the second marriage. This holding was based on the fact that under Alaska law, which did not recognize military pensions as marital property, the portion of the pension earned during the first marriage became the sole property of the husband at the time of the first divorce.

Implicit in and consistent with the *Hildebrand* opinion is the notion that the marital estate includes only that portion of the pension which is earned during the marriage. A number of other courts have adopted this rule. See, e.g., *In re Marriage of Gallo*, 752 P.2d 47 (Colo. 1988); *In re Marriage of Parker*, 252 Ill. App. 3d 1015, 625 N.E.2d 237 (1993); *Urbick v. Urbick*, 474 N.W.2d 452 (Minn. App. 1991); *Olivo v. Olivo*, 82 N.Y.2d 202,

624 N.E.2d 151, 604 N.Y.S.2d 23 (1993); *Randol v. Randol*, 849 P.2d 1118 (Okla. App. 1993); *Noll v. Noll*, 297 S.C. 190, 375 S.E.2d 338 (S.C. App. 1988); *Banagan v. Banagan*, 437 S.E.2d 229 (Va. App. 1993); *Butcher v. Butcher*, 178 W. Va. 33, 357 S.E.2d 226 (1987). On consideration, we adopt the rule that the marital estate includes only that portion of a pension which is earned during the marriage.

Husband was in the military for 24 years. Husband and wife were married for 13 of those years. The marital estate thus includes thirteen twenty-fourths of husband's military pension.

Because the trial court chose to award wife a portion of husband's monthly pension income, rather than a lump sum, we must also calculate the portion of husband's monthly pension income which should be included in the marital estate. Husband's retiree account statement reflects that his gross monthly pension income is $1,259 and that after a deduction for federal income tax, three additional deductions are taken from this amount.

The first deduction is "VA Compensation." In explanation, husband testified that he is a disabled veteran, that the deducted amount is sent by the Veterans' Administration, and that the deducted amount is not taxable. Husband's explanation is less than complete. However, it appears that neither husband nor wife has any rights in the money represented by this deduction. The deducted amount, therefore, is not a part of the marital estate.

The second deduction is a "Survivor Benefit Plan Cost" of $81.84. Husband testified that this amount pays for a pension to be paid to his survivors upon his death. Husband also testified that he would stop paying for this benefit unless ordered to pay by the court. As such, we will not consider survivor benefit plan cost as a true deduction.

The third deduction is an "Allotment" of $75.44. Husband testified that this allotment pays for term life insurance on both himself and wife. Although we recognize that life insurance may be a worthwhile expense, the allotment constitutes no more than a direct payment from husband's pension account into his life insurance account. Accordingly, we will not consider the allotment as a true deduction.

Husband's gross pension income, less his federal income tax withholding and VA compensation payment, equals $1,086.88. The marital estate includes thirteen twenty-fourths of this amount, or $588.73. The decree awarded wife $335 per month from this pension—57 percent of the marital estate portion of the pension.

Having determined the contents of the marital estate, we must now examine the property awarded to each party and the value of that property. Although the parties' briefs present very different assessments of the total value of the property awarded to each, the record reflects that the parties did not dispute the value of any property other than the residence. We begin by outlining the property awarded to each party and the value of that property.

The trial court ordered the parties to equally divide the savings bonds and the thrift savings account. As discussed previously, the savings bonds are valued at $50 each, $2,150 total. The thrift account is valued at $24,893.63.

The trial court awarded husband the pickup truck and other personal property. Husband estimated the truck's value at $18,500, of which $2,000 is equity and $16,500 is debt. The court ordered that husband alone would be liable for this debt. Not all of the personal property awarded to husband was assigned a value. Those items for which values were assigned, including the items he took from the residence, some of the items specifically awarded him, and his guns, total $5,930. Those items for which no value was assigned include tools, sporting equipment, a gun cabinet, a Shop-Vac, a self-propelled lawnmower, garden tools, a collection of wine pitchers, cookbooks and technical books, animal skull mounts and tanned skins, luggage, and a potbellied stove.

The trial court awarded wife the Jeep, other personal property, $1,000 in insurance proceeds, a portion of husband's pension, and the marital residence. Wife estimated the Jeep's value at $8,900, of which $4,721.08 is equity and $4,178.92 is debt. The court ordered that wife alone would be responsible for this debt. Not all of the personal property awarded to wife was assigned a value. Those items for which a value was assigned, including the items which wife listed as remaining in

the residence and the additional items which husband listed as remaining in the residence, total $9,275. Items for which no value was given include ladders, kitchen utensils, and bronze cookware.

We now turn to the marital residence. Husband prepared an exhibit entitled "Major Assets and Liabilities of the Parties." That exhibit lists the value of the home as $55,000. The exhibit also lists $47,000 in encumbrances on the home. Wife prepared similar exhibits listing the parties' assets and liabilities. Wife listed the value of the home as $50,000. Wife testified that the house would have a value of $55,000 if the garage roof was repaired and the kitchen repainted. Wife listed $47,549 in encumbrances on the home.

The trial court made no findings regarding the value of the home or the extent of the encumbrances thereon. Since we find neither party's testimony more credible than the other, we have decided to split the difference. We find that the value of the home is $52,500, of which $5,225.50 is equity and $47,274.50 is debt. The trial court ordered that wife alone would be liable for this debt.

In summary, the parties' assets, not counting the pension, equal $54,195.22, and the parties' liabilities equal $67,953.42. The trial court's division of the property award wife 60 percent of the assets and 76 percent of the liabilities, husband 40 percent of the assets and 24 percent of the liabilities. Additionally, the trial court awarded wife 57 percent of the marital estate portion of husband's monthly pension.

Having outlined the property division, we may now address husband's contention that the property was inequitably divided. Though generally a division of one-third to one-half of the marital estate is appropriate, property divisions are not subject to any rigid mathematical formula. *Blaser v. Blaser*, 225 Neb. 104, 402 N.W.2d 875 (1987); *Sullivan v. Sullivan*, 223 Neb. 273, 388 N.W.2d 516 (1986). In determining the appropriateness of a division of marital property, the ultimate test is one of reasonableness. *Preston v. Preston*, 241 Neb. 181, 486 N.W.2d 902 (1992); *Hildebrand v. Hildebrand*, 239 Neb. 605, 477 N.W.2d 1 (1991); *Mellor v. Mellor*, 235 Neb. 361, 455 N.W.2d 546 (1990). See Neb. Rev. Stat. § 42-365 (Reissue

1988).

Husband cites *Ritz v. Ritz*, 229 Neb. 859, 429 N.W.2d 707 (1988), for the proposition that when both parties to a dissolution have worked throughout the marriage and no children are involved, the property should be divided equally. In *Ritz*, the trial court awarded the husband a higher percentage of the marital estate than the wife. In calculating the amount awarded to each party, we were careful to use *net* values—the total assets awarded to each less the total liabilities awarded to each. We held that the trial court had divided the property—largely a working farm—in the only feasible manner. We required the husband to make a cash payment to the wife in order to equalize the property division.

In the present action, the property division left husband with more assets than debts, but left wife with more debts than assets. Husband received approximately $21,500 in assets and $16,500 in debts, for a net surplus of $5,000. Wife received approximately $33,700 in assets and $51,500 in debts, for a net deficiency of $17,800. If we were to strictly follow *Ritz*, as husband suggests, husband would be ordered to make a cash payment to wife, not vice versa. Rather than order a lump-sum payment, the trial court ordered husband to pay wife a portion of his pension each month. This order fulfills the requirements of, and does not conflict with, *Ritz*.

In dividing property upon a dissolution of marriage, a court should consider four factors: (1) the circumstances of the parties; (2) the duration of the marriage; (3) the history of contributions to the marriage, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities; and (4) the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party. § 42-365.

The first factor we consider is the circumstances of the parties. At the time of trial, husband was 48 years old and wife was 46 years old. Husband testified that his health was "not great"; that he suffered from high blood pressure, diabetes, and gout; and that his teeth "are in bad shape." Wife testified that her health was "okay."

The next three factors we consider are the duration of the marriage, the contributions to the marriage, and the parties' ability to obtain gainful employment. We will consider these factors together.

In the present action, neither party brought significant assets to the marriage. Both parties were gainfully employed throughout the 20-year marriage and contributed their earnings to the marriage. Husband first served in the military and now is employed, in a civilian capacity, as a meteorologist at Offutt Air Force Base. Wife is a visual merchandiser—she decorates department stores—and is currently employed by Dillard's department stores.

Considering the factors outlined above, the division of the marital estate was reasonable. Both parties are approximately the same age, though husband is in somewhat poorer health. Both parties worked throughout the marriage and contributed their earnings to the marriage. The parties' net marital estate, not including the pension, is in the red. Wife received the lion's share of this deficiency. To compensate, she received a higher share of the marital estate portion of the pension than husband. We find that the trial court did not abuse its discretion in dividing the marital estate.

Husband next asserts that the trial court erred in awarding wife alimony of $300 per month for 10 years.

"The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances . . . make it appropriate." § 42-365. Alimony should not be used to equalize the incomes of the parties or to punish one of the parties. *Preston v. Preston*, 241 Neb. 181, 486 N.W.2d 902 (1992); *Kimbrough v. Kimbrough*, 228 Neb. 358, 422 N.W.2d 556 (1988).

In determining whether alimony should be awarded, a court should consider the same four factors used in determining a division of property. In addition to these four factors, a court determining alimony should also consider what effect, if any, the marriage had on the ability of the wife to secure gainful employment in the future and the earning capacity of the husband. See, *Preston, supra*; *Stuczynski v. Stuczynski*, 238 Neb. 368, 471 N.W.2d 122 (1991); *Kimbrough, supra*. As with a

division of property, the ultimate test is one of reasonableness. *Preston, supra*; *Stuczynski, supra*. See § 42-365.

We first consider the marriage's effect on wife's employability. Although wife is gainfully employed in her chosen field, the marriage has nonetheless affected her earning capacity. During the marriage, wife's career was often interrupted by the frequent moves necessitated by husband's service in the military. Wife lived first in Spain, then in Michigan, then in Switzerland, then in Illinois, then in Spain again, then in Germany, and then finally in Nebraska. Wife testified that these moves prevented her from building up any significant seniority.

Wife interrupted her career to follow her husband in his career. These interruptions caused wife to lose seniority. When a spouse sacrifices seniority for the sake of a marriage, a court may consider that loss of seniority as favoring an award of alimony. See, *Kennedy v. Kennedy*, 622 So. 2d 1033 (Fla. App. 1993) (Diamantis, J., dissenting); *Brook v. Brook*, 289 So. 2d 766 (Fla. App. 1974); *In re Marriage of Beeh*, 214 N.W.2d 170 (Iowa 1974); *In re Marriage of Brown*, 462 N.W.2d 683 (Iowa App. 1990); *LaValle v. LaValle*, 430 N.W.2d 224 (Minn. App. 1988); *In re Marriage of Tibbles*, 63 Or. App. 774, 665 P.2d 1267 (1983); *Carty v. Carty*, 87 Wis. 2d 759, 275 N.W.2d 888 (1979). Accord *Prosser v. Prosser*, 156 Neb. 629, 57 N.W.2d 173 (1953).

We next consider husband's ability to pay. According to husband's 1991 W-2 form, his monthly wages, after taxes, are $1,835.75. Husband's monthly pension income, after deducting for taxes, his VA payment, and his court-ordered payment to wife, is $751.88. Husband's stated monthly expenses are $2,121 plus $75.44 automatically deducted from his pension for life insurance. In all, husband's income outstrips his expenses by $391.19 per month.

We also note wife's need for support. According to her 1991 W-2 form, her monthly wages, after taxes, are $1,367. Her monthly income from husband's pension is $335. Wife's stated expenses are $2,254.73 plus $104.39 automatically deducted from her paycheck for health insurance. Husband argues that wife's housing expenses are too high because she has retained

the marital residence and must pay both the mortgage and the home improvement loan, which total $781.52 per month. Husband suggests that we replace this expense with a $400 expense for an "average rental expense" and order the house sold. We are constrained to point out that, at trial, wife requested the marital residence and husband stated that he had no objection to this request. Additionally, husband failed to present any evidence of the cost of an average monthly rental. In all, wife's expenses outstrip her income by $657.12 per month.

In light of husband's positive monthly balance, wife's negative monthly balance, and wife's 20 years of lost seniority, we find that the trial court did not abuse its discretion in awarding wife $300 per month for 10 years.

Husband next asserts that the trial court erred in awarding wife $250 in temporary attorney fees as part of the court's temporary order and $500 in attorney fees as part of the dissolution decree. In dissolution proceedings, an award of attorney fees depends on a variety of factors, including the amount of property and alimony awarded, the earning capacity of the parties, and the general equities of the situation. *Preston v. Preston*, 241 Neb. 181, 486 N.W.2d 902 (1992); *Smith v. Smith*, 222 Neb. 752, 386 N.W.2d 873 (1986). The property division in the present action resulted in wife receiving a net deficiency of $17,800 and husband receiving a net surplus of $5,000. This discrepancy is somewhat remedied by the monthly payments that wife will receive from husband. Those monthly payments, however, do not compensate wife so completely as to justify a reversal of the trial court's award of attorney fees. We find that the trial court did not abuse its discretion in awarding attorney fees.

The judgment of the trial court is affirmed as modified herein.

AFFIRMED AS MODIFIED.

WHITE, J., participating on briefs.

JOHN R. YOUNG, JR., APPELLANT, V. FIRST UNITED BANK OF BELLEVUE, A NEBRASKA BANKING CORPORATION, ET AL., APPELLEES.

516 N.W.2d 256

Filed May 27, 1994. No. S-92-1001.

1. **Summary Judgment: Proof.** The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law.
2. _____: _____. After the moving party has shown facts entitling it to a judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents a judgment as a matter of law for the moving party.
3. **Summary Judgment: Appeal and Error.** In reviewing an order sustaining a motion for summary judgment, an appellate court views the evidence in a light most favorable to the party opposing the motion and gives that party the benefit of all reasonable inferences that may be deduced from the evidence.
4. **Libel and Slander.** Whether a qualified privilege exists is a matter of law.
5. _____. In the law of libel and slander, a communication is privileged if made bona fide by one who has an interest in the subject matter to one who also has an interest in it or stands in such relation that it is a reasonable duty, or is proper, for the writer to give the information.
6. **Libel and Slander: Proof.** The truth in itself and alone shall be a complete defense unless it shall be proved by the plaintiff that the publication was made with actual malice. Actual malice shall not be inferred or presumed from publication.
7. **Libel and Slander: Words and Phrases.** Malice has been defined as hate, spite, or ill will.
8. _____: _____. Defamation is language the nature and obvious meaning of which is to impute to a person the commission of a crime or to subject him to public ridicule, ignominy, or disgrace.
9. **Affidavits.** Supporting and opposing affidavits (1) shall be made on personal knowledge, (2) shall set forth such facts as would be admissible in evidence, and (3) shall show affirmatively that the affiant is competent to testify to the matters stated therein.
10. _____. Statements in affidavits as to opinion, belief, or conclusions of law are of no effect.

Appeal from the District Court for Douglas County: MICHAEL MCGILL, Judge. Affirmed.

Jeffrey A. Silver for appellant.

Thomas J. Walsh and Larry A. Jobeun, of Walsh, Fullenkamp & Doyle, for appellees.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ.

BOSLAUGH, J.

The plaintiff, John R. Young, Jr., appeals from the judgment of the district court for Douglas County, which granted the defendants' motion for summary judgment. Young had sought damages for alleged libel, but the trial court found that the communication in issue was true, qualifiedly privileged, and made without malice. Young assigns as error the granting of the motion, claiming that the issues of qualified privilege, malice, and the truth of the statements in the letter are questions of fact for the jury.

The defendants in this action are Crown Bancshares, Inc. (Crown), First United Bank of Bellevue (FUB), and Charles R. Clatterbuck. Crown is a holding company for FUB. Both Crown and FUB are Nebraska corporations. Clatterbuck is FUB's current chairman of the board and is Crown's acting chairman of the board.

Young was employed as the president and chief executive officer of FUB from its inception in December 1985 until his resignation in March 1988. During the term of his employment, Young had the authority to make loans of up to $200,000. The board of directors of FUB had the right to approve or disapprove the loans that Young made. FUB made a significant number of bad loans between its inception and the time of Young's resignation. The parties dispute the actual amount of control exercised by each other over the loans that FUB made. A resolution of this dispute is not necessary to the analysis of this case.

Clatterbuck and Robert Doyle, an FUB board member, asked Young to resign in March 1988. He resigned, accepting an offer to act as a consultant to FUB for $3,000 per month over the next 6 months. The board of FUB made three payments and discontinued the payments, alleging that Young had misled the board in his operation of FUB. Young successfully sued FUB for nonpayment. Clatterbuck stated during a deposition taken for the trial that he questioned Young's integrity. Following the lawsuit, Doyle was quoted in The Bellevue Leader newspaper as

saying that the ruling of the trial court did not clear Young of any wrongdoing because "Young did not take the stand to rebut anything."

On June 29, 1990, Clatterbuck, as the chairman of Crown, sent the letter which is the subject of this suit to Crown's shareholders. In pertinent part, the letter stated:

> Most of you are aware that First United Bank has been plagued with severe problems stemming from decisions made while the bank was being managed by Mr. John Young and Tom Edwards [vice-president of FUB during Young's tenure]. As a result, your company lost over $1.1 million dollars, mostly attributed to poor loan decisions and excessive overhead expense.

Young filed this action in the district court for Douglas County. He sought special and general damages for libel, alleging that the June 29 letter was defamatory and made with malice. He further alleged that within 20 days, he had sent a demand for correction pursuant to Neb. Rev. Stat. § 25-840.01 (Reissue 1989). In answer, the defendants alleged that the statements in the letter were true, qualifiedly privileged, and made without malice.

The defendants moved for summary judgment. The district court found that the statements were true and qualifiedly privileged, but stated that the truth of the statements and the qualified privilege of the communication did not dispose of the case. The district court found that damages would be available regardless of truth or privilege if the communication had been made with actual malice. The court reviewed the allegations made by Young and held that the actions of the defendants did not constitute actual malice. Accordingly, the district court granted summary judgment for the defendants. Young appealed.

The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law. *Healy v. Langdon*, 245 Neb. 1, 511 N.W.2d 498 (1994). After the moving party has shown facts entitling it to a judgment as a matter of law, the opposing party has the burden to present evidence

showing an issue of material fact which prevents a judgment as a matter of law for the moving party. *Id.* In reviewing an order sustaining a motion for summary judgment, an appellate court views the evidence in a light most favorable to the party opposing the motion and gives that party the benefit of all reasonable inferences that may be deduced from the evidence. *Id.*

Young claims that three issues of material fact exist that preclude summary judgment: (1) whether the statements in the June 29 letter were true, (2) whether the letter is qualifiedly privileged, and (3) whether the statements were made with malice. We will address each of these matters separately.

The district court found that the statements about Young's decisions were true. Young claims that the statements were false because the board, not Young, managed FUB and approved each loan. Young claims that the board made all the major decisions and that he was not responsible for the condition of FUB. The record shows that the board appointed a "loan committee" to review loans made by Young and Edwards after most of the bad loans were made. The vast majority of the bad loans which resulted in the losses to FUB were made when Young was the president of FUB and before the loan committee came into existence. Young admits that he had authority to make loans on behalf of FUB. No evidence was presented that showed that his authority was hindered before the formation of the loan committee. He admits that he alone was in charge of the day-to-day operations of FUB. The trial court correctly found that the truth of the statements was not in issue; FUB's losses were attributable to the decisions that were made while Young was its manager.

The district court also found that the letter was a qualifiedly privileged communication. Whether a qualified privilege exists is a matter of law. *Molever v. Levenson*, 539 F.2d 996 (4th Cir. 1976). The trial court quoted *Turner v. Welliver*, 226 Neb. 275, 287, 411 N.W.2d 298, 307 (1987), for the following proposition of law:

> A communication is privileged if made bona fide by one who has an interest in the subject matter to one who also has an interest in it or stands in such relation that it is a

reasonable duty, or is proper, for the writer to give the information.

A remarkably similar situation was addressed by the U.S. Court of Appeals for the Fourth Circuit in *Molever v. Levenson, supra*. In *Molever*, a former bank president filed actions for libel and slander against several of the bank's board members who had been critical of his performance during a board meeting. The board members allegedly made statements that the former president had been " 'grossly incompetent in his position as president of the Bank' " and that the former president had " 'wrecked this bank and is responsible for its present financial crisis.' " 539 F.2d at 1004. The jury returned a verdict for the former president, and the trial court entered a judgment notwithstanding the verdict for the board members, which was upheld by the circuit court.

In this case, the trial court noted that no evidence was presented which showed that the June 29 letter was sent to anyone other than the shareholders. The June 29 letter was a communication between the chairman of a corporation and the shareholders of the corporation. Other courts have held that communications between a director of a corporation and the shareholders of the corporation are qualifiedly privileged. See, e.g., *Kainz v. Lussier*, 4 Haw. App. 400, 667 P.2d 797 (1983); *World Oil Co. v. Hicks*, 46 S.W.2d 394 (Tex. Civ. App. 1932); *Lind v. Lynch*, 665 P.2d 1276 (Utah 1983).

In *Turner v. Welliver, supra*, this court held that a qualified privilege existed between an insurer and an insured because the parties share a common interest. The director of a corporation and the shareholders of the corporation share an interest that is at least as compelling as that shared by parties to an insurance contract. This court agrees with the finding of the trial court that the June 29 letter enjoyed a qualified privilege as a matter of law and that no issue of material fact existed which precluded summary judgment.

Since this court has resolved the questions regarding truth and qualified privilege, the only assigned error yet unresolved concerns the trial court's finding that insufficient evidence of malice existed for the case to go forward. Young must prove actual malice to prevail at trial. See *Whitcomb v. Nebraska*

State Education Assn., 184 Neb. 31, 165 N.W.2d 99 (1969). "Where a qualified privilege exists, there can be no recovery without proof of malice." *Turner v. Welliver*, 226 Neb. at 287, 411 N.W.2d at 307. "The truth in itself and alone shall be a complete defense unless it shall be proved by the plaintiff that the publication was made with actual malice. Actual malice shall not be inferred or presumed from publication." Neb. Rev. Stat. § 25-840 (Reissue 1989).

Malice has been defined as hate, spite, or ill will. *Turner v. Welliver, supra.* Young cites as proof of malice the statement of Doyle to The Bellevue Leader that the ruling in favor of Young in the contract case did not clear Young of any wrongdoing. Young also cites as proof of malice the statement by Clatterbuck in his deposition that Clatterbuck questioned Young's integrity. Young cites *Fitzgerald v. Young*, 89 Neb. 693, 132 N.W. 127 (1911), for the proposition that defamation that is not pled may be introduced to prove malice, but not damages, when malice is in fact an issue. However, neither of these statements is defamatory. Defamation is language the nature and obvious meaning of which is to impute to a person the commission of a crime or to subject him to public ridicule, ignominy, or disgrace. *Treutler v. Meredith Corporation*, 455 F.2d 255 (8th Cir. 1972). Young offers no proof that the statements made by the defendant are defamatory, and the trial court was correct in finding that the statements were not evidence of actual malice.

Young claims that the timing of the letter is further proof of malice; the letter was sent more than 2 years after Young had left FUB. The defendants contend that the letter was sent to Crown's shareholders in 1990 only after Crown was aware of its financial status and was directed to inform its shareholders by the FDIC. Young offered neither proof that the alleged delay was malicious nor reasons why a jury might find the delay malicious. The trial court properly ruled that the alleged delay in the dissemination of the letter was not evidence of malice.

Finally, Young claims that paragraph 17 of his affidavit is sufficient to deny summary judgment. That paragraph states: "In Affiant's opinion, the letter which is the subject of this litigation was not made in good faith, was done with malice,

and with no reasonable or probable grounds for the allegations contained therein to be true." The trial court found that the affidavit was not sufficient to resist a motion for summary judgment. We agree. "The rule in Nebraska regarding . . . affidavits requires that '[s]upporting and opposing affidavits [1] shall be made on personal knowledge, [2] shall set forth such facts as would be admissible in evidence, and [3] shall show affirmatively that the affiant is competent to testify to the matters stated therein.' " *White v. Ardan, Inc.*, 230 Neb. 11, 21, 430 N.W.2d 27, 33 (1988) (quoting Neb. Rev. Stat. § 25-1334 (Reissue 1989)). " '[S]tatements in affidavits as to opinion, belief, or conclusions of law are of no effect. . . .' " *Eden v. Klaas*, 165 Neb. 323, 328, 85 N.W.2d 643, 646 (1957). The statements made in paragraph 17 of Young's affidavit are conclusory and, therefore, of no effect.

Because we find that the trial court correctly determined that the statements in the June 29 letter were true, qualifiedly privileged, and made without actual malice, we hold that the granting of the defendants' motion for summary judgment was proper. The trial court's judgment is affirmed.

AFFIRMED.

WHITE, J., dissenting.

I agree with majority that Clatterbuck's letter was qualifiedly privileged. However, I would find that Young has at least raised an issue of fact as to whether Clatterbuck acted with malice. I would therefore hold that summary judgment is inappropriate. Accordingly, I respectfully dissent.

A defendant to a libel action may establish that the allegedly libelous communication was qualifiedly privileged. The plaintiff can overcome this privilege by establishing that the communication was made with actual malice. *Turner v. Welliver*, 226 Neb. 275, 411 N.W.2d 298 (1987). In the context of a qualified privilege, actual malice means hate, spite, or ill will. *Id.*

The majority states that defamatory statements which have not been pled may be introduced as evidence of malice. True enough. But a statement need not be defamatory to be evidence of malice. "I wrote that letter with hate, spite, and ill will" is not a defamatory statement, but is clearly evidence of malice.

Virtually any admissible statement may be introduced as evidence of malice. The real question, on a motion for summary judgment, is whether the statement which has been introduced raises an issue of fact as to malice.

In deposition, Clatterbuck testified that he questioned Young's integrity. The testimony raises the possibility that Clatterbuck bore Young ill will, which in turn raises the possibility that Clatterbuck's letter was written with actual malice. Young has presented a genuine issue of material fact as to malice, and he should be able to try this issue to a jury.

IN RE ESTATE OF DEMPSEY DAVID HOLT, DECEASED. ALAN J. MACKIEWICZ, PERSONAL REPRESENTATIVE OF THE ESTATE OF DEMPSEY DAVID HOLT, DECEASED, APPELLANT, V. DOUGLAS COUNTY, NEBRASKA, APPELLEE.

516 N.W.2d 608

Filed May 27, 1994. No. S-92-1067.

1. **Decedents' Estates: Appeal and Error.** An appellate court reviews probate cases for error appearing on the record made in the county court.
2. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.
3. **Statutes.** In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning, and when the words of a statute are plain, direct, and unambiguous, no interpretation is necessary or will be indulged to ascertain their meaning.
4. **Attorney Fees: Costs.** No attorney fees or costs shall be assessed if a claim or defense was asserted by an attorney or party in a good faith attempt to establish a new theory of law in this state.

Appeal from the District Court for Douglas County, LAWRENCE J. CORRIGAN, Judge, on appeal thereto from the County Court for Douglas County, JANE H. PROCHASKA, Judge. Judgment of District Court reversed, and cause remanded with direction.

Alan J. Mackiewicz, of Lich, Herold & Mackiewicz, for appellant.

James S. Jansen, Douglas County Attorney, Renne Edmunds, and Edwin T. Lowndes for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ.

FAHRNBRUCH, J.

The issue here is whether intangible personal property located in Nebraska is subject to inheritance tax in this state when a decedent's estate is probated here and the testator was a Texas resident at the time of his death.

The Douglas County Court held that under Neb. Rev. Stat. § 77-2007.01 (Reissue 1990) of the Uniform Reciprocal Transfer Tax Act, such intangible personal property is not subject to this state's inheritance tax. The district court for Douglas County reversed the county court and held that such intangible property is taxable in Nebraska.

The personal representative timely appealed the district court's ruling to the Nebraska Court of Appeals. Under our authority to regulate the caseloads of the appellate courts of this state, we removed the matter to this court.

We reverse the decision of the district court and remand this cause to that court with direction to reinstate and affirm the judgment of the Douglas County Court.

ASSIGNMENT OF ERROR

Summarized and restated, the personal representative of the decedent's estate, Alan J. Mackiewicz, claims that the district court erred in holding that the decedent's intangible personal property located in Nebraska is subject to Nebraska's inheritance tax.

STANDARD OF REVIEW

An appellate court reviews probate cases for error appearing on the record made in the county court. *In re Estate of Trew*, 244 Neb. 490, 507 N.W.2d 478 (1993); *In re Estate of Stephenson*, 243 Neb. 890, 503 N.W.2d 540 (1993).

FACTS

The decedent, Dempsey David Holt, a resident of Tarpley, Bandera County, Texas, died testate in Texas on December 17, 1990. Mackiewicz was designated personal representative of Holt's estate. Mackiewicz initiated probate proceedings in the Douglas County Court and later filed a petition for determination of inheritance tax in that court. The property of the decedent's estate relevant to this appeal consists of intangible personal property having an actual situs at Norwest Bank Nebraska, N.A., in Omaha: two checking accounts, four certificates of deposit, and an individual retirement account.

The appellee, Douglas County, claims that Holt's intangible personal property in Nebraska is subject to Nebraska's inheritance tax. The appellant claims that the property is exempt from Nebraska's inheritance tax pursuant to § 77-2007.01, which generally exempts from Nebraska's inheritance tax a nonresident decedent's intangible personal property located in Nebraska if the decedent's resident state, here Texas, grants a similar exemption to residents of Nebraska. The parties submitted the issue to the county court on stipulated facts.

The county court found that under § 77-2007.01, Holt's intangible personal property in Nebraska is not subject to Nebraska's inheritance tax even though that property was in Nebraska and the probate proceedings were in Nebraska.

On appeal, the district court for Douglas County found that Nebraska's inheritance tax should be imposed on Holt's intangible personal property in Nebraska. Although recognizing that Nebraska law permitted the appellant to probate Holt's estate in Nebraska, the district court stated that (1) the proper state to tax the transfer of Holt's intangible property should have been Texas and (2) if the appellant had probated Holt's estate in Texas, that state would have imposed a death tax on Holt's intangible personal property in Nebraska. The district court then determined that the intent of Nebraska's reciprocal exemption law is to prevent double or multiple death taxation by different states on the same transfer of property, not to avoid taxation. Therefore, the district court held that Nebraska's inheritance tax should be imposed upon Holt's

intangible personal property in Nebraska. The district court reversed the county court and remanded the cause to that court for further proceedings.

The personal representative appealed to the Nebraska Court of Appeals. Under our authority to regulate the caseload of the appellate courts of this state, we removed the matter to this court.

ANALYSIS

Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below. *Abdullah v. Nebraska Dept. of Corr. Servs.*, 245 Neb. 545, 513 N.W.2d 877 (1994). In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning, and when the words of a statute are plain, direct, and unambiguous, no interpretation is necessary or will be indulged to ascertain their meaning. *Id.*

Section 77-2007.01 states:

> The tax imposed by Chapter 77, article 20, in respect of personal property (except tangible personal property having an actual situs in this state) shall not be payable (1) if the decedent is a resident of a state . . . which at the time of the transfer did not impose a transfer tax or death tax of any character in respect of personal property of residents of this state (except tangible personal property having an actual situs in such state . . .), or (2) if the laws of the state . . . of residence of the decedent at the time of the transfer contained a reciprocal provision under which nonresidents were exempted from transfer taxes or death taxes of every character in respect of personal property (except tangible personal property having an actual situs therein) provided the state . . . of residence of such nonresidents allowed a similar exemption to residents of the state . . . of residence of such decedent.

We find no ambiguity in the words of § 77-2007.01. Giving the words of § 77-2007.01 a plain reading, we find that Holt's intangible personal property in Nebraska is not subject to Nebraska's inheritance tax if, at the time of the transfer of the

property, Texas did not impose a transfer or death tax on the intangible personal property of Nebraska residents.

At the time of the transfer, Texas law contained the following provision:

> (a) A tax is imposed on the transfer at death of the property located in Texas of every nonresident.
>
> . . . .
>
> (c) Property located in Texas of a nonresident includes real property having an actual situs in this state . . . and tangible personal property having an actual situs in this state, but *intangibles that have acquired an actual situs in this state are not taxable.*

(Emphasis supplied.) Tex. Tax Code Ann. § 211.052 (West 1992).

Under the plain language of the Texas statute, a Nebraska resident's intangible personal property having an actual situs in Texas is not taxed by Texas. Therefore, § 77-2007.01 dictates that Nebraska's inheritance tax on personal property is not payable on Holt's intangible personal property in Nebraska.

It may be true, as the district court found, that in general the intent of reciprocal exemption laws is not to avoid taxation altogether, but to avoid double or multiple taxation. To prevent nonresidents from avoiding taxation completely, at least one state has limited the exemption provided for in its reciprocal transfer tax law to cases in which the decedent's resident state has imposed a tax on the transfer of the property exempted. See Wis. Stat. Ann. § 72.11 (West 1989). Nebraska's version of the Uniform Reciprocal Transfer Tax Act contains no such language, and we will not impose such a limitation when Nebraska's Legislature has not seen fit to do so.

We have considered the appellee's interpretations of both the Texas law and § 77-2007.01 of this state's law and find these interpretations to be without merit. Therefore, under a plain reading of the relevant Nebraska and Texas statutes, we find that Nebraska's inheritance tax is not payable as to Holt's intangible personal property having an actual situs in Nebraska.

Finally, we address the appellant's motion in this court for an award of attorney fees pursuant to Neb. Rev. Stat. § 25-824 et

seq. (Reissue 1989). The appellant argues that an award of attorney fees is warranted because the appellee's appeal from the county court to the district court was frivolous.

Section 25-824(5) states: "No attorney's fees or costs shall be assessed if a claim or defense was asserted by an attorney or party in a good faith attempt to establish a new theory of law in this state . . . ." We find that in appealing the county court's decision, the appellee made a good faith attempt to establish a new theory of law that § 77-2007.01 does not exempt from Nebraska's inheritance tax a nonresident's intangible personal property which has an actual situs in Nebraska. As this is a case of first impression on this theory, no attorney fees will be assessed.

CONCLUSION

We hold that no Nebraska inheritance tax is payable as to Holt's intangible personal property having an actual situs in Nebraska. We, therefore, find no error appearing on the record of the county court. We reverse the district court's decision with direction for that court to reinstate and affirm the judgment of the Douglas County Court.

REVERSED AND REMANDED WITH DIRECTION.

PHILIP M. KELLY, APPELLEE AND CROSS-APPELLANT, V. LINDA F. KELLY, APPELLANT AND CROSS-APPELLEE.

516 N.W.2d 612

Filed May 27, 1994. No. S-93-114.

1. **Appeal and Error.** An appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it.
2. _____. An appellate decision is not authority for any point not required to be decided in the case then before the court.
3. **Divorce: Child Custody: Appeal and Error.** Although in dissolution proceedings determinations as to custody are reviewed on appeal de novo on the record, such determinations are initially entrusted to the discretion of the trial judge and will be affirmed unless they constitute an abuse of that discretion; where credible evidence is in conflict on a material issue of fact, the appellate court considers,

and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.

4. **Alimony.** In awarding alimony, a court should consider, in addition to the specific criteria listed in Neb. Rev. Stat. § 42-365 (Reissue 1988), the income and earning capacity of each party as well as the general equities of each situation.
5. **Alimony: Appeal and Error.** The ultimate test for determining correctness in the amount of alimony is reasonableness, and the trial court's determination will normally be affirmed in the absence of an abuse of discretion.
6. **Judges: Words and Phrases: Appeal and Error.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.
7. **Alimony: Appeal and Error.** In reviewing an alimony award, an appellate court does not determine whether it would have awarded the same amount of alimony as did the trial court, but whether the trial court's award is untenable such as to deprive a party of a substantial right or just result.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, and CONNOLLY and IRWIN, Judges, on appeal thereto from the District Court for Scotts Bluff County, RONALD D. OLBERDING, Judge. Judgment of Court of Appeals reversed, and cause remanded with direction.

Samuel W. Segrist, of Meister & Segrist, for appellant.

Richard A. Douglas, of Nichols, Douglas, Kelly, and Meade, P.C., for appellee.

HASTINGS, C.J., WHITE, CAPORALE, FAHRNBRUCH, and LANPHIER, JJ.

CAPORALE, J.

I. STATEMENT OF CASE

In this action the district court dissolved the marriage of the parties and, among other things, awarded custody of their three minor boys to the petitioner-appellee husband, Philip M. Kelly, and alimony to the respondent-appellant wife, Linda F. Kelly. The wife thereafter appealed to the Nebraska Court of Appeals, and the husband cross-appealed. That court reduced the amount of alimony, but otherwise affirmed the decree of the district court. *Kelly v. Kelly*, 2 Neb. App. 399, 510 N.W.2d 90 (1993). As a consequence, the wife petitioned this court for further review. Although she had assigned a number of other

errors to the district court, in her petition for further review she complains only, in summary, that the Court of Appeals erred in (1) leaving custody of the children with the husband and (2) modifying the district court's alimony award. We granted the petition and now, finding merit in one of the errors assigned to the Court of Appeals, reverse the judgment of that court and direct that it affirm the decree of the district court.

II. FACTS

The parties met while both were attending college and married on June 23, 1973.

The husband had graduated a year before their marriage, whereupon he entered the Army as an officer, serving on active duty until late 1974. The wife completed 3 years of college and thereafter embarked on a 1-year course of study in Colorado, preparing to be a cytotechnologist, one who examines body fluids for the purpose of diagnosing diseases. In order to help her meet expenses, the husband sent her money each month both before and during the marriage until she graduated in December 1973.

Following his departure from the Army, the husband, in August 1974, entered law school. During this time, he received approximately $300 per month under a federal program and worked part time from May 1975 until he graduated in 1977, earning approximately $300 per month. The wife worked full time from November 1974 until April 1977, earning approximately $600 per month, when the parties adopted the first of three boys, each of whom was adopted within a week of birth. The boys are Brian, born April 13, 1977; Kevin, born February 25, 1979; and Adam, born December 4, 1981.

In August 1977, the parties moved to Gering, Scotts Bluff County, Nebraska, and the husband has practiced law in the area since that time. His annual salary as a partner of a law firm at the time of trial in late 1992 was $70,000; however, his total income from his law practice, after the inclusion of bonuses in recent years, was as follows: 1991, $119,505; 1990, $106,154; 1989, $105,601.

The wife worked part time as a cytologist from 1978 until 1989, taking time off and reducing her hours when the second

and third sons were adopted. At the time of the decree, the wife was in the process of relocating and was looking for employment in her field. She had received one offer of employment to commence at approximately $38,000 per year, with an increase to $40,000 per year once she was reacquainted with the work. It appears that she subsequently accepted a different job sometime between the entry of the October 1992 decree and a subsequent hearing on the issue of child support. That job paid $16.75 per hour, or approximately $34,800 per year.

By the time of trial, the parties had accumulated assets having a net value of $141,073, which the court divided such that the husband received $85,184 net worth of assets and the wife $55,889. In addition, the district court awarded the wife $14,648, half of the $29,295 difference in their respective shares of the net marital estate, to be paid in 60 equal monthly installments, and further ordered the husband to pay the wife alimony in the amount of $1,500 per month for 120 months, commencing November 1, 1992.

As to the custody issue, the husband testified that he actively assisted in all facets of caring for the boys. When they were infants, he sterilized bottles, fixed formula, mixed other food and vegetables, bathed them, changed diapers, and cleaned up after them. He took them to the doctor when they were ill, sometimes by himself and at other times with his wife, and would often leave work so that he could go with the boys to the doctor.

The husband coached the boys' little league baseball teams, sometimes coaching two teams during the same season. He took time off work to attend school activities and sporting events.

He prepared many of the boys' meals, including breakfast, lunch, and supper. For the last 2 or 3 years prior to the parties' separation, he got the boys up, fed them breakfast, and the majority of the time got them ready for school. Sometimes the wife would wake up and join them, and sometimes she would not. He helped the boys with their homework.

The husband emphasized church attendance by the family and would insist that they attend church, while the wife would

make comments that they should skip church and Sunday School, saying, "It is dumb, they don't get anything out of this." Often he accompanied the boys to church meetings without the wife.

He discussed his perceptions of the boys' traits and personalities and their individual needs. He described the wife as one who is very negative in her approach and who says things that are very hurtful to the boys. He, on the other hand, tries to be positive and encouraging, talking to them on a regular basis about what is going on. He seeks to refrain from destroying their spirit when he is angry with them or their behavior.

The husband attempted to act as an emotional buffer between the wife and the boys. He does not feel that the wife can handle the boys' emotional needs. He believes she is physically and verbally abusive to the boys.

As a result, he tried not to wake up the wife in the mornings because, when awakened, she would become upset and get the other family members upset. On two occasions since the parties separated, the wife and one of the boys were involved in physical altercations, hitting each other.

When asked why he did not think the wife could handle rearing the boys, the husband replied:

> There is a basic difference in our approach and our emotional makeup. My job is to nurture the children. My job is to look out for them, and to protect them from harm, and to watch out for their emotions as best as I can. Her emotional makeup is, that she needs the children to nurture her. She is dependent upon the children for her emotional needs, and I am not.

In explaining why he feels she is a negative person, he referred to her negative talk about church and explained that she made comments that the schools are bad, that the teachers are dumb, and that Scottsbluff is a dull place. He considers this to be a bad influence on the boys; in his view, they need to have a positive outlook.

The husband stated that if he were granted custody, he would be able to adapt his work schedule to meet the boys' needs.

Predictably, the wife has a different perspective. She testified that she has been actively involved in raising the boys.

According to her, it is she who has been responsible for their day-to-day needs, since the husband was gone a great deal because of his work schedule. In her view, she was more involved in the discipline of the boys than the husband.

The wife acknowledged, however, that the husband was involved in the boys' activities, including church, swimming, baseball camp, and the like, and was actively involved in caring for them. Prior to the separation, he spent his time involved in family activities when not at work. She believed that his work required him to be gone more than a couple of evenings a month. She admitted that he had stopped participating in an evening golf league after she asked him to do so because one of the boys voiced concerns about it.

She also confirmed that for the 2 years prior to the separation, the husband sometimes fixed breakfast for the boys but denied that he fixed their breakfast and got them ready for school while she stayed in bed each day. She recognized that he had been called twice since their separation to resolve arguments between one of the boys and her.

The husband called as a witness a woman who had been primarily a friend of the wife. The friend lives about eight blocks from the Kelly home, has known the family for approximately 8 years, and typically saw the wife a couple of times a week.

This witness observed the husband in several activities with the children, including attending events with the boys at the swimming pool where she teaches, helping one of the boys who was a substitute on a paper route, showing the boys his trains in the basement, and being with the boys many times when she visited the Kelly home. In her opinion he is a very good, affectionate, supportive, and positive father.

According to her, the wife treated the children as one of her friends and "depends on the kids. Instead of mothering she depends on them, she is their friend." She witnessed a lot of arguing between the wife and the boys and fighting among the boys. She feels that the wife does not have a normal parent-child relationship with the boys because of her yelling at them and the state of turmoil in the home with the yelling among them, which seemed to be constant. But the friend did

say that the yelling in the household also occurred when the husband was around. She never observed either of the parents discipline the boys.

The husband also called a psychotherapist nurse as a witness, who also was of the view that the husband had the better emotional capacity to serve as a parent.

When asked with whom they preferred to live, Brian picked his father, while Kevin and Adam said they would prefer to live with their mother. They all thought their mother was serious about moving away from Scottsbluff. Brian wanted to stay in Scottsbluff; Kevin did not know how he felt about moving; and Adam said, "I want to live with my mom most."

III. ANALYSIS

With that recitation of the portion of the record which relates to the issues presented by the summarized errors assigned to the Court of Appeals, we turn our attention to the analysis of those matters.

1. Custody

In the first summarized assignment of error, the wife attacks the Court of Appeals' affirmance of the district court's custody ruling by complaining that it failed to consider the admissibility of the nurse's testimony. Rather, the Court of Appeals chose to handle her attack on the admissibility of that evidence by observing that it need not address the issue, for even if it were to be that some or all of the nurse's testimony should have been excluded and the Court of Appeals were accordingly to refuse to consider the evidence, the record would nonetheless continue to support the district court's decree in that regard.

Contrary to the wife's contention, the Court of Appeals acted quite properly in that regard, for an appellate court is not obligated to engage in an analysis which is not needed to adjudicate the case and controversy before it. Indeed, an appellate decision is not authority for any point not required to be decided in the case then before the court. See *Duggan v. Beermann*, 245 Neb. 907, 515 N.W.2d 788 (1994). It was entirely appropriate for the Court of Appeals to assume without deciding that the nurse's testimony was improperly admitted and to resolve the case based on the remainder of the

record. See, *In re Interest of L.H. et al.*, 241 Neb. 232, 487 N.W.2d 279 (1992) (appellate court in trial de novo on record disregards evidence which should not have been admitted and determines whether remaining evidence justifies termination of parental rights); *In re Interest of Aufenkamp*, 214 Neb. 297, 333 N.W.2d 681 (1983).

Although in dissolution proceedings determinations as to custody are reviewed on appeal de novo on the record, such determinations are initially entrusted to the discretion of the trial judge and will be affirmed unless they constitute an abuse of that discretion. Where credible evidence is in conflict on a material issue of fact, the appellate court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Hansen v. Hansen*, 240 Neb. 31, 480 N.W.2d 204 (1992).

Without giving any consideration to the nurse's testimony, our de novo review of the remainder of the record causes us to independently conclude that the district court did not abuse its discretion in ruling as it did in the matter of custody. While the record does not establish that the wife is an unfit parent, it does demonstrate that the district court could well conclude that the husband, because of his greater patience and ability to relate to the boys, was the better parent and that the boys' interests would be best served by placing their custody in and with him.

In so saying, we are not unmindful that the two younger boys expressed a preference to live with the wife, but such desires are in no sense controlling. See *Dennis v. Smith*, 217 Neb. 147, 347 N.W.2d 873 (1984).

2. Alimony

In the remaining summarized error assigned to the Court of Appeals, the wife complains of the reduction of the district court's $180,000 alimony award ($1,500 per month for 120 months) to $72,000 ($1,500 per month for 24 months plus $1,000 per month for the next 36 months).

Neb. Rev. Stat. § 42-365 (Reissue 1988) provides, in relevant part:

> When dissolution of a marriage is decreed, the court

may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party. . . .

While the criteria for reaching a reasonable division of property and a reasonable award of alimony may overlap, the two serve different purposes and are to be considered separately. The purpose of a property division is to distribute the marital assets equitably between the parties. The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances and the other criteria enumerated in this section make it appropriate.

The Court of Appeals' decision places undue focus on only a few of the many factors to be considered in awarding alimony, improvidently writing:

" 'The purpose of alimony is to provide for the continued maintenance or support of one party by the other when the relative economic circumstances . . . make it appropriate.' " Neb. Rev. Stat. § 42-365 (Reissue 1988). Among the factors to be considered in an award of alimony is " 'the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party.' " *Id.* Alimony is not to be used simply to equalize the income of the parties, but to assist the economically disadvantaged party during a period of unavailability for employment or training for employment. See *Preston v. Preston*, 241 Neb. 181, 486 N.W.2d 902 (1992). Nebraska statutes and case law clearly indicate that alimony is a means of helping the economically disadvantaged party get through the period of transition after the divorce, until that party becomes self-sufficient, remarries, or dies.

Kelly v. Kelly, 2 Neb. App. 399, 408-09, 510 N.W.2d 90, 96 (1993).

It is true that under the circumstances presented in *Preston v. Preston*, 241 Neb. 181, 486 N.W.2d 902 (1992), we held that alimony was not warranted. However, the obligor's monthly expenses therein exceeded his gross monthly income. While that was also the obligee's situation, her shortfall was far less than was that of the obligor. The record also demonstrated that the obligor's income was unlikely to increase greatly. Thus, *Preston* provides no guidance to the proper adjudication of the present case.

Section 42-365 does not define the purpose of alimony to be as narrow as the Court of Appeals concluded. Rather, the final paragraph of the statute indicates that alimony is to provide for the maintenance of one party by another when the relative economic circumstances and other criteria enumerated above make it appropriate. For good reason, neither the statutes nor our decisions have ever enumerated a baseline of income or level of employment potential which would preclude the need for maintenance. As an equitable matter, such a determination must be made on the facts of each case. Indeed, we have noted that in awarding alimony, a court should consider, in addition to the specific criteria listed in § 42-365, the income and earning capacity of each party as well as the general equities of each situation. *Taylor v. Taylor*, 222 Neb. 721, 386 N.W.2d 851 (1986).

Here, the parties were married for 19 years. The wife made substantial contributions to the marriage and enabled the husband to pursue his studies while they were married and raising a son. Although she reduced her work outside the home after the husband entered the practice of law, she continued to work part time in addition to caring for the children and managing the household until 1989, when they were fairly well established financially. Furthermore, she interrupted the full-time pursuit of her career in cytology in order to care for the children and manage the household.

The ultimate test for determining correctness in the amount of alimony is reasonableness, and the trial court's determination will normally be affirmed in the absence of an

abuse of discretion. *Baratta v. Baratta*, 245 Neb. 103, 511 N.W.2d 104 (1994); *Helms v. Helms*, 234 Neb. 630, 452 N.W.2d 269 (1990); *Ritter v. Ritter*, 234 Neb. 203, 450 N.W.2d 204 (1990).

A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *Sabatka v. Sabatka*, 245 Neb. 109, 511 N.W.2d 107 (1994); *Wulff v. Wulff*, 243 Neb. 616, 500 N.W.2d 845 (1993); *Pendleton v. Pendleton*, 242 Neb. 675, 496 N.W.2d 499 (1993).

Thus, in reviewing an alimony award, an appellate court does not determine whether it would have awarded the same amount of alimony as did the trial court, but whether the trial court's award is untenable such as to deprive a party of a substantial right or just result.

It is important to recognize that although the wife is fortunate enough to be able to reenter her career, her income potential is approximately a third of that of the husband. The district court's alimony award tends to even out that disparity and provides the wife with the means to partially recapture the standard of living that she and the husband jointly put together during their 19 years of marriage. Under the circumstances, the district court's award cannot be said to have constituted an abuse of discretion.

IV. JUDGMENT

Thus, as first mentioned in part I, the judgment of the Court of Appeals is reversed and the cause remanded with the direction that it affirm the judgment of the district court.

REVERSED AND REMANDED WITH DIRECTION.

BOSLAUGH, J., participating on briefs.

WRIGHT, J., not participating.

VELMA DICKIE, APPELLEE, V. FLAMME BROTHERS, INC., APPELLANT.

516 N.W.2d 618

Filed June 3, 1994. No. S-92-141.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Reversed and remanded.

Richard Register for appellant.

James A. Gallant for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, FAHRNBRUCH, and LANPHIER, JJ., and GRANT, J., Retired.

PER CURIAM.

This matter was submitted to the court after Donald Flamme, a stockholder of Flamme Brothers, Inc., appealed from an order of the district court approving the "Final Report of Receiver" of that corporation in a proceeding filed by plaintiff, Velma Dickie, seeking involuntary dissolution of defendant corporation under Neb. Rev. Stat. § 21-2096 (Reissue 1991).

Examination of the transcript, the bill of exceptions, and the briefs of the parties shows that those documents do not furnish enough information, or explanation, to enable the court to determine whether the district court's order approving the final report should be affirmed.

Accordingly, the cause is remanded to the district court for Dodge County, Nebraska, for further proceedings. The district court shall require the appointed receiver to file, within 30 days, an inventory, which the receiver was ordered to conduct within 30 days of his appointment on September 22, 1987. The inventory shall list all real and personal property owned by the corporation as of the date of the receiver's appointment, together with the value of the assets listed and a statement of all mortgages and security interests in the items of property. The inventory shall be submitted under oath and positively verified by the receiver.

The district court shall then require the receiver to file an amended final report identifying the source of money received

and the property for which the money was paid and also identifying the reason for the payments made. The final report shall be in such form that the trial court and any reviewing court can readily understand what had occurred in connection with the corporation's property up to the date of the filing of the report. The report shall be submitted under oath, positively verified by the receiver.

In this connection, the record shows that the receiver has received $18,000 for 83.75 hours of work, or approximately $215 per hour. It shall be ordered by the district court that the inventory and amended final report be prepared and filed by the receiver without further cost to Flamme Brothers or other parties to the action.

The district court shall conduct a hearing, after notice, to determine if the amended final report should be approved, and, if so, the receiver's bond should be exonerated and Flamme Brothers dissolved.

REVERSED AND REMANDED.

ANTON J. HORVATH, APPELLANT, V. M.S.P. RESOURCES, INC., AND CONAGRA, INC., DOING BUSINESS AS NORTHERN STATES BEEF, APPELLEES.

517 N.W.2d 89

Filed June 3, 1994. No. S-92-344.

1. **Pleadings.** Neb. Rev. Stat. § 25-811 (Reissue 1989) requires that a defendant's answer "shall contain . . . a statement of any new matter constituting a defense."
2. **Summary Judgment.** Summary judgment is proper when the pleadings, depositions, stipulations, and affidavits in the record disclose that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.
3. **Summary Judgment: Appeal and Error.** In appellate review of a summary

judgment, the appellate court reviews the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Reversed and remanded for further proceedings.

Michael J. Haller, Jr., and Patricia McCormack, of O'Connor & Associates, for appellant.

John F. Thomas and Ronald G. Fleming, of McGrath, North, Mullin & Kratz, P.C., for appellee ConAgra.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, FAHRNBRUCH, and LANPHIER, JJ., and GRANT, J., Retired.

GRANT, J., Retired.

Appellant, Anton J. Horvath, sued M.S.P. Resources, Inc. (MSP), and ConAgra, Inc., doing business as Northern States Beef (ConAgra), for injuries appellant received while working as an employee of MSP in a building owned by ConAgra. MSP was made a party solely under the provisions of Neb. Rev. Stat. § 48-118 (Reissue 1988) and has not filed an appellate brief.

Appellant's amended petition alleged that the building owned by ConAgra was "used as a meat packing and processing plant." Appellant further alleged that there was a "rail" in ConAgra's building "used to transfer large carcasses of beef within the building," that ConAgra "negligently allowed the 'rail' to become unsafe," that "the 'rail' had become unsafe due to the construction of said 'rail,' " and that this condition was known by ConAgra or should have been known. Appellant then alleged that on January 23, 1990, he was an employee of MSP and was injured when the rail collapsed and carcasses of beef and the rail fell on appellant. Appellant alleged that ConAgra was negligent as follows:

a. In failing to maintain the "rail" in a reasonably safe condition for the use of the employees of M.S.P. Resources, Inc.;

b. In permitting the bolts that hold the "rail" to become and remain loosened and detached for a long period of time, thereby creating a dangerous and hazardous

condition for Plaintiff and other persons lawfully within the building;

c. In failing to inspect the "rail" to determine whether it was safe for use, and, on inspection, in failing to warn Plaintiff and others lawfully using the "rail" of the dangerous condition thereon;

d. In failing to repair the "rail" when for a long period of time Defendant knew or, with the exercise of due care should have known of the dangerous condition of the "rail".

e. In otherwise failing to observe that care and caution required of a reasonably prudent person under the circumstances.

ConAgra's answer admitted that appellant was an employee of MSP, that ConAgra owned the building where the accident occurred, and that the building was used as a meatpacking and processing plant, but denied appellant's other allegations, except those that constituted admissions against interest.

ConAgra also alleged that the proximate cause of appellant's injuries was appellant's own contributory negligence, that appellant "knew and assumed the risk of working in the packing house and using this rail," and that the petition failed to state a cause of action. No other defenses were pled in the answer.

On January 13, 1992, ConAgra filed a motion for summary judgment "for the reason that the pleadings and other matters filed herein show that there is no genuine issue on [appellant's] claims and [ConAgra] is entitled to judgment as a matter of law."

This motion concluded, "In support of this motion for summary judgment, [ConAgra] submits its brief and the affidavit of Henry Wallace."

Hearing was held on the motion on February 6, 1992. At that hearing, ConAgra submitted the affidavit of Henry Wallace, referred to in ConAgra's motion, and also submitted a copy of an agreement between ConAgra and MSP dated June 26, 1989, and two additional affidavits, each dated February 5, 1992. It appears that the three exhibits submitted at the summary judgment hearing were not timely served on appellant as

required by Neb. Rev. Stat. § 25-1332 (Reissue 1989). There is no indication in the record as to the time of serving of the ConAgra-MSP agreement on appellant. The other two affidavits were executed on the day before the hearing. Appellant, however, did not object to any of the documents submitted, and the court, on appellant's request to "leave the record open for about ten days," gave appellant 10 days to submit counteraffidavits. No such affidavits were filed. While we do not approve of such a procedural approach, we determine that, under the circumstances, ConAgra's motion for summary judgment was before the trial court.

We also note, at this point, that the trial court's order sustaining ConAgra's motion for summary judgment states that the case is controlled by the law set out in *Plock v. Crossroads Joint Venture*, 239 Neb. 211, 475 N.W.2d 105 (1991), and that "the plaintiff is barred by the exclusivity of the [Workers'] Compensation Act." *Plock* also discusses the fact that, in that case, the defendant had not pled the exclusivity defense in its answer. There is no mention in ConAgra's answer in this case as to any such affirmative defense, nor is that concept mentioned in ConAgra's motion for summary judgment or in the submitting of the motion to the trial court. Apparently, ConAgra's position was disclosed in its brief to the trial court. Appellant, however, has not objected or raised any question as to the requirements of Neb. Rev. Stat. § 25-811 (Reissue 1989) that a defendant's answer "shall contain . . . a statement of any new matter constituting a defense." Since the case is to be reversed for the reasons hereinafter set out, it might be well that the case be properly pled and properly submitted.

The trial court found that there was no material fact to be decided and that ConAgra was entitled to judgment as a matter of law and, therefore, sustained the motion for summary judgment. Appellant timely appealed to the Nebraska Court of Appeals, and we, under the authority of Neb. Rev. Stat. § 24-1106(3) (Cum. Supp. 1992), removed the case to this court in order to regulate the caseloads of the Nebraska appellate courts. We reverse the judgment and remand the cause for further proceedings.

We first note that the bill of exceptions contains a fifth

exhibit, appropriately marked exhibit 5. It is dated April 1, 1992, which was the day appellant's motion for new trial was denied. A "Reporter's Note," following the index of the bill, states, "Exhibit 5 was marked, offered and ruled on on April 1, 1992, without a record; please find the same received into evidence located on page 10." Exhibit 5 is a document reflecting a single-judge award in the Nebraska Workers' Compensation Court in a case between appellant and MSP. It is dated February 12, 1992, 6 days after the hearing in this case. There is no record concerning this exhibit as to what party offered it or if the other party objected. The record does not show if it is a final award or, indeed, if it is an award. It was untimely filed. The exhibit will not be considered on this appeal.

Our scope of review is clear. We have held that summary judgment is proper when the pleadings, depositions, stipulations, and affidavits in the record disclose that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Bauers v. City of Lincoln*, 245 Neb. 632, 514 N.W.2d 625 (1994); *Rowe v. Allely*, 244 Neb. 484, 507 N.W.2d 293 (1993). In appellate review of a summary judgment, the appellate court reviews the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Bauers v. City of Lincoln, supra*; *Rowe v. Allely, supra*.

The affidavits before the trial court do not address, in any way, the question of appellant's alleged contributory negligence, or appellant's alleged assumption of risks. As stated above, neither ConAgra's answer or other pleadings, nor the record as to the submitting of the motion to the trial court, suggests any affirmative defense. Appellant, however, states in his brief on appeal:

> ConAgra moved for summary judgment on the basis that the Plaintiff's employer, [MSP], entered into a contract with ConAgra assuming responsibility for maintenance and repair of the premises. ConAgra contends that any liability they may incur is derived solely from the actions of its independent contractor/agent, [MSP] and that because [MSP] is relieved of common law

> liability under the Workers Compensation Act, so too, is ConAgra.

Brief for appellant at 1.

Similarly, ConAgra, in its brief, states:

> [ConAgra] moved for Summary Judgment on the basis that [MSP] entered into a contract with [ConAgra] whereby MSP was to act as the independent contractor/agent of [ConAgra]. (T12). MSP assumed responsibility for maintenance and repair of the premises. (E1,1:5,6). The issue before the Court was whether Plaintiff was barred from pursuing a negligence action against [ConAgra] based on the exclusivity of the Workers Compensation Act due to its relationship with its independent contractor/agent MSP (Plaintiff's employer).

Brief for appellee at 1.

The transcript before us, at page 12 or elsewhere, does not contain any reference to a contract. Nonetheless, it appears that both parties were operating on some sort of "notice pleading," and we will consider the case on the basis the parties have briefed it on appeal.

In its order sustaining ConAgra's motion for summary judgment, the trial court stated that the controlling law in this matter is set forth in *Plock v. Crossroads Joint Venture*, 239 Neb. 211, 475 N.W.2d 105 (1991). ConAgra agrees with this statement and contends that the judgment must be affirmed. Appellant contends that there are differences between the facts in *Plock* and in this case. We agree with appellant on this issue.

In *Plock*, the defendant, Crossroads Joint Venture (CJV), entered into a contract with MS Management Associates, Inc. (MSM), a company which employed the injured plaintiff. The opinion states:

> CJV entered into a management agreement with MSM . . . pursuant to which MSM assumed the responsibility for the management, control, and maintenance of the shopping center.
>
> . . . .
>
> Under the terms of the management agreement . . . MSM was responsible for . . . maintaining and repairing

> the premises through independent contractors or its own employees . . . .

239 Neb. at 214, 475 N.W.2d at 109-10.

In the instant case, the agreement between MSP and ConAgra provided in part:

> RECITALS
>
> 1. Whereas, MSP is in the business of supplying contract labor (production and maintenance workers) to slaughter/fabrication processing operations, among other operations; and,
>
> 2. Whereas, [ConAgra] requires such contract labor at its plant located at 3435 Gomez Street, Omaha, Nebraska; and,
>
> 3. Whereas, MSP desires to provide the said contract labor to [ConAgra] at the said location.
>
> NOW THEREFORE, THE PARTIES HERETO AGREE AS FOLLOWS:
>
> 1. Services. (a) MSP shall provide the production and maintenance labor as required by [ConAgra] to operate the beef slaughtering facility located at 3435 Gomez Street, Omaha, Nebraska. As sole compensation therefor, [ConAgra] shall pay to MSP its actual costs, including agreed upon payroll charges, plus the sum of $725.00 per week. . . .
>
> (b) It is understood and agreed that MSP shall be responsible to communicate to the production and maintenance labor provided hereunder, a hazardous communication program with respect to the specific location to which that labor is assigned. In connection herewith, [ConAgra] agrees to cooperate fully with MSP in providing an appropriate hazard communication program, including applicable material data sheets.
>
> (c) Finally, MSP shall provide all of the services referred to hereinabove to the highest industry standards.

The agreement goes on to provide that MSP is an independent contractor, that MSP must procure workers' compensation insurance and liability insurance, and that MSP must indemnify ConAgra for all claims made against ConAgra. The final paragraph provides, "This Agreement represents the

whole and entire Agreement between the parties. No other agreements or representations, oral or written, have been made by either party. This Agreement may not be altered, modified or amended except in writing properly executed by the parties hereto."

The basic difference between *Plock v. Crossroads Joint Venture, supra*, and this case is that in *Plock*, the plaintiff's employer contracted to maintain and repair the premises, while in the case before us, appellant's employer agreed to "provide the production and maintenance labor as required . . . to operate the slaughtering facility." The agreement between ConAgra and MSP stated that MSP's business was "supplying contract labor" and that ConAgra "requires such labor."

In its brief, ConAgra contends that "MSP assumed responsibility for the maintenance and repair of the premises. (E1,1:5,6)." Brief for appellee at 1. Exhibit 1 is the three-page agreement and was the first exhibit received at the hearing on ConAgra's motion. "1:5,6" is a reference whose meaning cannot be deciphered. Paragraph 1(c) of the agreement provides that "MSP shall provide all of the services referred to hereinabove to the highest industry standards." Paragraph 3 of the agreement, "Hiring," provides that the services to be performed by MSP shall be performed by qualified employees. Paragraph 5(c) of the agreement, "Insurance and Indemnification," states that MSP will indemnify ConAgra from all costs arising out of the work to be performed by MSP. The fact remains that the work to be performed and the services to be performed are not described or set out in the contract, except as a service to furnish "contract labor."

The three affidavits do not shed much light on the question of MSP's contractual duties. All three express conclusions as to MSP's duties under the contract. The affidavit of Wallace, the operations manager at ConAgra's plant, states that he is familiar with the agreement and that "MSP is responsible for maintenance and repair at the [ConAgra] plant."

The other two affidavits are those of MSP employees. The two affidavits are identical. Each states that the affiant is an MSP employee and that the affiant's "maintenance duties included checking the plant and its machinery and fixtures for

proper and safe operation by both the M.S.P. employees in the slaughter operation and the [ConAgra] employees in the fabrication operation" and the "inspection of the entire facility, including the rails upon which the hanging cattle are transported from the cooler to the [ConAgra] fabrication operation, including the rails which allegedly broke and injured Anton Horvath."

The agreement between MSP and ConAgra puts MSP in the category of an employment agency. The record does not disclose any contractual agreement on the part of MSP to repair or maintain anything. The record does not show any contractual obligation for responsibility or supervisory duty in connection with any service, beyond the requirement that MSP furnish qualified employees. It may be that extrinsic evidence might show some industry standard, or conduct of the parties, which might be construed to show that the furnishing of maintenance laborers means the furnishing party also agrees to maintain something. There is nothing, however, in the words of exhibit 1 that shows that MSP has promised to do any maintenance.

We recognize that summary judgment is proper when the pleadings, depositions, stipulations, and affidavits in the record disclose that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Bauers v. City of Lincoln*, 245 Neb. 632, 514 N.W.2d 625 (1994). We also recognize that after the moving party has shown facts entitling it to judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents a judgment as a matter of law for the moving party. *Flynn v. Bausch*, 238 Neb. 61, 469 N.W.2d 125 (1991).

Appellant has presented no evidence, but ConAgra has not shown facts entitling it to judgment as a matter of law. ConAgra's position is premised on the holding in *Rowley v. City of Baltimore*, 305 Md. 456, 474, 505 A.2d 494, 503 (1986) (cited in *Plock*):

> We hold that where, as here, the independent contractor has assumed responsibility for maintenance and repairs, and the harm has occurred to the contractor or his

> employee as a result of a defect arising from the failure of the contractor to make those repairs, nothing in §§ 416-429 [Restatement (Second) of Torts (1965)] operates to impose liability upon the person who hired the contractor.

In the case before us, the truncated record shows no contractual assumption of responsibility for repairs. There are no pleadings, depositions, stipulations, or affidavits before us which show that there is no genuine issue of material fact and that ConAgra, as the moving party, is entitled to judgment as a matter of law.

We further point out that ConAgra's statement in its brief, that "Plaintiff's allegations that the condition of the rail was a 'latent defect' is [sic] brought up upon appeal for the first time and should be disregarded by this court," is not correct. Brief for appellee at 17. Appellant's amended petition alleged in paragraph 5 that "[t]he 'rail' had become unsafe due to the construction of said 'rail'. This condition was known to [ConAgra] or would have been known, had [ConAgra] exercised reasonable care and diligence." This allegation was not the subject of any motion to make more definite, but was generally denied. Appellant has said there is a defect caused by improper construction of a rail. Such a defect is latent. ConAgra generally denied this allegation. Without any evidence on the issue, it is not possible to say there is no defect, as a matter of law.

In its present posture, this case did not warrant summary judgment in favor of ConAgra. The summary judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

ANNETTE CARPENDER AND JACK CARPENDER, APPELLANTS, V. RICHARD BENDORF, APPELLEE.

516 N.W.2d 619

Filed June 3, 1994. No. S-92-375.

1. **Summary Judgment.** Summary judgment, pursuant to Neb. Rev. Stat. § 25-1330 et seq. (Reissue 1989), is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from these facts and that the moving party is entitled to judgment as a matter of law.
2. _____. In considering a motion for summary judgment, the evidence is to be viewed most favorably to the party against whom the motion is directed, giving to that party the benefit of all inferences which may reasonably be drawn from the evidence.
3. **Motor Vehicles: Pedestrians: Highways: Right-of-Way.** Neb. Rev. Stat. § 39-643(1) (Reissue 1988) provides: "Every pedestrian who crosses a roadway at any point other than within a marked crosswalk, or within an unmarked crosswalk at an intersection, shall yield the right-of-way to all vehicles upon the roadway."
4. **Negligence: Proof.** Contributory negligence is an affirmative defense which must be proved by the party asserting such defense.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Reversed and remanded.

John M. DiMari, of Law Office of John M. DiMari, and Thomas K. Harmon, of Respeliers and Harmon, P.C., for appellants.

Larry E. Welch and Susan E. Norris, of Gross & Welch, P.C., for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, FAHRNBRUCH, and LANPHIER, JJ., and GRANT, J., Retired.

GRANT, J., Retired.

This case arose out of an automobile-pedestrian accident which occurred in Omaha, Nebraska, on May 27, 1987. Plaintiff Annette Carpender (plaintiff) sued Peony Park, Inc., and Richard Bendorf (defendant) for injuries and damages she received as a result of the accident. Her husband, Jack Carpender, joined in the petition.

After answer, Peony Park filed its motion for summary

judgment, which was granted. The Carpenders did not appeal from that judgment, and Peony Park will not be further considered.

Defendant answered, generally denying the Carpenders' allegations as to how the accident happened and alleging that the proximate cause was the contributory negligence of plaintiff. Defendant then filed a motion for summary judgment, which was granted. The Carpenders timely appealed to the Nebraska Court of Appeals. Pursuant to Neb. Rev. Stat. § 24-1106(3) (Cum. Supp. 1992), we removed the appeal to this court to regulate the caseloads of the Nebraska appellate courts.

On appeal, plaintiff, in summary, assigns a single error: that the trial court erred in granting summary judgment in favor of defendant on the basis of determining that plaintiff was guilty, as a matter of law, of contributory negligence to such a degree as to bar recovery. We reverse and remand.

We first note that summary judgment, pursuant to Neb. Rev. Stat. § 25-1330 et seq. (Reissue 1989), is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from these facts and that the moving party is entitled to judgment as a matter of law. *Double K, Inc. v. Scottsdale Ins. Co.*, 245 Neb. 712, 515 N.W.2d 416 (1994).

In considering a motion for summary judgment, the evidence is to be viewed most favorably to the party against whom the motion is directed, giving to that party the benefit of all inferences which may reasonably be drawn from the evidence. *Hines v. Pollock*, 229 Neb. 614, 428 N.W.2d 207 (1988).

Defendant's motion for summary judgment was submitted to the trial court on the depositions of plaintiff and defendant and four photographs of the intersection of Cass Street and 83d Street in Omaha where the accident occurred.

The photographs show that Cass Street, which runs east and west, consists of five lanes. Two lanes run east, two lanes run west, and one lane is in the middle and is referred to as a "storage" lane or left-turn lane. The storage lane was marked

with a solid yellow line on each side, with a broken yellow line within the southernmost solid yellow line. Each of the five lanes appears approximately the same width. The yellow lines run from the east to a point opposite a double yellow line running north on 83d Street, which is a two-lane street that extends north from Cass Street and widens to three lanes where 83d Street enters Cass Street at a slight northwest-southeast angle. To the west of the double yellow line on 83d Street, there are two lanes—one unmarked lane, apparently permitting right-turn or straight-ahead traffic (into the entrance to a parking lot where plaintiff parked) and the other, a left-turn lane that feeds into the eastbound lanes on Cass Street. The T-intersection is controlled by a stop sign on 83d Street. There are no marked pedestrian crosswalks at the intersection of Cass Street and 83d Street.

Plaintiff's deposition shows that she had parked her car in a parking lot that adjoins Cass Street on the south and lies just east of the intersection. Plaintiff approached Cass Street and stood on the south side of the street on the sidewalk at a point slightly east of a line representing a projection of the east line of 83d Street. She stated that she never crossed Cass Street east of where she stood on the day of the accident and that where she stood "always appeared to be a corner there to me, I mean, the corner." She waited for approximately 5 minutes for automobile traffic to clear. Traffic was heavy in both directions.

She saw defendant's pickup truck stopped on 83d Street, pointing south. At the time she did not realize that the lane in which defendant was stopped was the left-turn lane. Plaintiff stated that she saw no turn signal flashing on defendant's vehicle. Plaintiff testified she saw defendant's vehicle after she had been waiting about 2 minutes and that she started to cross Cass Street about 3 minutes later. She stated that as she stepped off the curb, she looked both east and west and saw that defendant's vehicle was still sitting at the stop sign. She did not see the vehicle moving before she was struck by the front end of defendant's vehicle at a point "about two foot inside the yellow line of the turning lane."

Defendant's deposition showed that defendant was on 83d

Street at the intersection and was waiting at the stop sign for "two to three minutes" for Cass Street traffic to clear. He stated he looked to the west, then "to the east till I crossed the westbound traffic lanes, and then I took a quick glance back over my shoulder to the west to see what was headed east, made sure nobody pulled out of any parking lot or driveways along the way." As he waited he did not see anyone on the south side of Cass and did not see plaintiff at any time before the impact and had no idea where she came from. He stated his left turn signal was on. He also stated that when he first saw her, plaintiff was "five to eight feet off the painted line that was there that was the center line." He then stated that there was not a centerline, but two lines that "have a distance between them, what would be like an island. I guess, painted." Defendant also said that the impact between his truck and plaintiff left a dent approximately in the center of the hood of the truck.

Neb. Rev. Stat. § 25-21,185 (Cum. Supp. 1992) provides, in pertinent part:

> In all actions accruing before February 8, 1992, brought to recover damages for injuries to a person or property caused by the negligence . . . of another, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery when the contributory negligence of the plaintiff was slight and the negligence . . . of the defendant was gross in comparison, but the contributory negligence of the plaintiff shall be considered by the jury in the mitigation of damages in proportion to the amount of contributory negligence attributable to the plaintiff, and all questions of negligence . . . and contributory negligence shall be for the jury.

The immediate predecessor of this statute was § 25-1151, as transferred to § 25-21,185 in 1979. In *C. C. Natvig's Sons, Inc. v. Summers*, 198 Neb. 741, 747-48, 255 N.W.2d 272, 277 (1977), we said:

> "It should be noted here that the final provision of the comparative negligence statute requires that 'all questions of negligence and contributory negligence shall be for the jury.' While that language obviously does not affect the

> court's right to decide a case as a matter of law, it does emphasize the fact that the determination of questions of negligence and contributory negligence and the comparative measuring of them are basically factual issues which are generally for determination by the jury."

(Emphasis omitted.) See *Koerner v. Perrella*, 213 Neb. 189, 328 N.W.2d 473 (1982) (quoting *C. C. Natvig's Sons, Inc., supra*, with approval).

In his brief, defendant cites only one statute as applicable—Neb. Rev. Stat. § 39-643(1) (Reissue 1988). That statute provides: "Every pedestrian who crosses a roadway at any point other than within a marked crosswalk, or within an unmarked crosswalk at an intersection, shall yield the right-of-way to all vehicles upon the roadway." Throughout his brief defendant states, as a fact, that plaintiff attempted to cross Cass Street between intersections, and he cites many cases concerning pedestrians crossing streets between intersections. For the purposes of the application of the summary judgment rule, defendant's position is not convincing. The record shows that plaintiff was crossing Cass Street in the proximity of 83d Street and Cass Street. The convergence of 83d Street and Cass Street is an "intersection," as that term is defined in Neb. Rev. Stat. § 39-602(37) (Cum. Supp. 1986), albeit a T-intersection.

It is true that plaintiff stated there was not a crosswalk where she crossed Cass Street. It is also true there was not a marked crosswalk. Plaintiff's conclusion was not based on any foundation shown in the record. The definition of an unmarked "crosswalk" is set out in Neb. Rev. Stat. § 39-602(13)(a) (Cum. Supp. 1986). The legal or factual applicability of the unmarked pedestrian crosswalk concept is not discussed in the briefs before us, nor in the record of the proceedings.

Defendant, in his answer, pled the contributory negligence of plaintiff. The trial court found that "the plaintiff was contributorily negligent in a degree more than slight as a matter of law." Contributory negligence is an affirmative defense which must be proved by the party asserting such defense. *Lynn v. Metropolitan Utilities Dist.*, 225 Neb. 121, 403 N.W.2d 335 (1987); *Foland v. Malander*, 222 Neb. 1, 381 N.W.2d 914

(1986). There is nothing in the record as to whether plaintiff was in an unmarked crosswalk.

In addition, whether plaintiff's conduct as a pedestrian is appraised as requiring the application of the "pedestrian in a crosswalk" rule or not, other factual questions, militating against the application of summary judgment, exist. The record shows that before she started to cross Cass Street, plaintiff saw defendant's truck, and that as she stepped into Cass Street, she saw defendant's truck—motionless at the stop sign at 83d Street. Plaintiff stated defendant's left turn signal was not on.

In spite of the obvious fact that defendant saw clearly to the south, he did not see plaintiff waiting to cross Cass Street, did not see plaintiff enter Cass Street, did not see plaintiff cross the two eastbound lanes of Cass Street, and did not see plaintiff reach a point inside the two yellow lines delineating the left-turn lane in the middle of Cass Street. Defendant did not see plaintiff until "she was right there in front of me." The front of defendant's vehicle struck plaintiff, leaving a dent approximately in the middle of the vehicle's hood.

Neb. Rev. Stat. § 39-644 (Reissue 1988) provides: "Notwithstanding the other provisions of sections 39-601 to 39-6,122, every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway and shall give an audible signal when necessary . . . ."

Plaintiff's testimony in the record before us, which must be accepted as factual in the present posture of the case, precludes the issuance of summary judgment. According to plaintiff's testimony, when she was struck she was in a position inside painted yellow lines, outlining what defendant called a "painted island." Another vehicle standing in that lane would be legally protected from a collision caused by defendant. The trial court was in error, in this controverted factual situation, to grant summary judgment to defendant.

REVERSED AND REMANDED.

NORWEST BANK NEBRASKA, N.A., A FEDERAL BANKING INSTITUTION, APPELLEE, V. BILL R. BOWERS AND ILENE SUE BOWERS, APPELLANTS.

516 N.W.2d 623

Filed June 3, 1994. No. S-92-718.

1. **Conveyances: Statutes: Time.** Statutes covering substantive matters in effect at the time of the transaction govern, not later enacted statutes.
2. **Appeal and Error.** A party cannot complain of error which he has invited the court to commit.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Affirmed.

Jerome J. Ortman for appellants.

Thomas M. Locher and Kevin J. Dostal, of Hansen, Engles & Locher, P.C., for appellee.

HASTINGS, C.J., BOSLAUGH, CAPORALE, FAHRNBRUCH, and WRIGHT, JJ.

PER CURIAM.

Following a bench trial, the district court for Douglas County entered judgment in favor of Norwest Bank Nebraska, N.A. (Norwest Bank). Norwest Bank had sued Ilene Sue Bowers and her husband, Bill R. Bowers, to have certain conveyances by Henry and Eleanor Greenberg to their daughter, Ilene, set aside as fraudulent. The Bowerses now seek review of the district court's order overruling their motion for new trial.

We affirm the order of the district court.

FACTS

On March 18, 1992, Norwest Bank filed a second amended petition in a consolidated lawsuit against Ilene Sue Bowers and her husband, Bill R. Bowers, pursuant to the Uniform Fraudulent Conveyance Act (UFCA), Neb. Rev. Stat. § 36-601 et seq. (Reissue 1988). The UFCA was repealed by the Legislature in 1989 and was replaced with the Uniform Fraudulent Transfer Act, Neb. Rev. Stat. § 36-701 et seq. (Cum. Supp. 1992). In this case, Norwest Bank's cause of action against the Bowerses accrued in 1987. Statutes covering

substantive matters in effect at the time of the transaction govern, not later enacted statutes. *Schall v. Anderson's Implement*, 240 Neb. 658, 484 N.W.2d 86 (1992); *Holthaus v. Parsons*, 238 Neb. 223, 469 N.W.2d 536 (1991).

The petition alleged that in 1987 Norwest Bank's judgment debtor, Henry Greenberg, and his now-deceased wife, Eleanor Greenberg, fraudulently conveyed interests in three parcels of real estate, an automobile, a computer, and $68,869 in cash to their daughter, Ilene Sue Bowers.

Following a bench trial, the district court, on July 27, 1992, found that the transfers were made when Henry Greenberg was insolvent and that the transfers were made to hinder, delay, and defraud creditors, and it entered judgment for Norwest Bank. On July 30, the Bowerses filed a document entitled "Defendants' Motion for Judgment Notwithstanding the Verdict, in the Alternative for a New Trial, or, in the Alternative, for an Order of Remittitur and Notice of Hearing."

At a hearing on August 17, 1992, the Bowerses' counsel twice expressed his intent to file an appeal that same day and twice requested that the trial court overrule the Bowerses' motion for new trial. The trial court then overruled the motion for new trial.

On that same day, presumably subsequent to the trial court's overruling of their motion for new trial, the Bowerses filed a notice of intent to appeal which stated in relevant part:

> COME NOW the Defendants, and hereby give notice of their intent to appeal to the Nebraska Court of Appeals *from the overruling of Defendants' Motion for New Trial* entered herein by the Hon. Joseph S. Troia, District Court of Douglas County, Nebraska, dated August 17, 1992[,] for the reason that same is not supported by the evidence and it is contrary to law.

(Emphasis supplied.)

The Bowerses then proceeded with their appeal, raising several assignments of error. The case was removed from the Nebraska Court of Appeals to this court pursuant to our authority to regulate the caseloads of the appellate courts of this state.

ANALYSIS

It has long been the rule in this state that a party cannot complain of error which he has invited the court to commit. See, e.g., *Missouri P. R. Co. v. Fox*, 60 Neb. 531, 83 N.W. 744 (1900); *Campbell v. Crone*, 10 Neb. 571, 7 N.W. 334 (1880). Accord, *Schaneman v. Wright*, 238 Neb. 309, 470 N.W.2d 566 (1991); *First West Side Bank v. Hiddleston*, 225 Neb. 563, 407 N.W.2d 170 (1987); *Fuel Exploration, Inc. v. Novotny*, 221 Neb. 17, 374 N.W.2d 838 (1985).

The Bowerses' counsel, not once, but twice, requested that the trial court overrule the Bowerses' motion for new trial. The trial court complied with this request. Assuming but not deciding that it was error for the trial court to overrule the Bowerses' motion for new trial, this court finds that it was error invited by the Bowerses themselves. Therefore, the Bowerses will not now be heard to complain of the trial court's overruling their motion for new trial.

Because the Bowerses have appealed from only the overruling of their motion for new trial, there are no other issues before the court on appeal.

CONCLUSION

The order of the district court is affirmed.

AFFIRMED.

WHITE, J., participating on briefs.
LANPHIER, J., not participating.
WHITE, J., dissents.

PAUL A. ROSBERG ET AL., APPELLANTS, V. NANCI L. LINGENFELTER, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF RAYMOND M. LINGENFELTER, DECEASED, APPELLEE.

516 N.W.2d 625

Filed June 3, 1994. No. S-92-791.

1. **Pleadings.** An affirmative defense must be specifically pled to be considered.
2. **Pleadings: Limitations of Actions.** When it is not apparent from the face of the

petition that the action is barred by the statute of limitations, the affirmative defense of the statute of limitations must be raised in the answer.

3. **Jury Instructions: Appeal and Error.** It is error to submit to the jury an issue which is not pleaded in the case.

Appeal from the District Court for Pierce County: DEWAYNE WOLF, Judge. Reversed and remanded for a new trial.

Paul A. Rosberg, pro se.

Stephen C. Wade, of Curtiss & Wade, P.C., for appellee.

HASTINGS, C.J., WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ.

PER CURIAM.

The plaintiffs, Paul A. Rosberg and his children, filed this action in replevin against the defendant, Nanci L. Lingenfelter, individually and as personal representative of the estate of Raymond M. Lingenfelter, for the recovery of a grain bin. The plaintiffs also claimed damages for detention, loss of use, and costs of moving the bin. The case was tried to a jury, which returned a verdict in favor of the defendant.

The plaintiffs have appealed to this court. Among other things, the plaintiffs assign as error the trial court's instructing the jury on the statute of limitations.

Rosberg purchased a parcel of farmland from Raymond and Dora Goeres on contract. Rosberg defaulted on this contract, and in 1984, the Goereses filed a foreclosure action against Rosberg. Following a judgment for the Goereses, the farmland was sold in a sheriff's sale to the Small Business Administration. The sheriff's sale was confirmed on July 12, 1985.

The bin in question was purchased and put on the farmland in 1983. In March 1985, Betty Rosberg, the purchaser of the bin, executed a financing statement in favor of Spencer Rosberg, Paul Rosberg's father. The financing statement granted Spencer Rosberg a security interest in the bin among other items. In March 1990, Spencer Rosberg filed a continuation of the financing statement and at the same time assigned his interest in the bin to Paul Rosberg and his children.

In July 1986, Glen Kumm purchased the farmland from the

SBA along with all fixtures attached thereto. Kumm took possession of the farmland in the same month. Throughout the remainder of 1986 and 1987 Paul and Betty Rosberg wrote several letters to Kumm attempting to get various items of property which they had left on the farmland when they vacated; included among these items was the grain bin.

In 1989, Kumm cleaned the grain bin and removed it from the farmland. He made several improvements to the bin and sold it to the defendant and her family.

The plaintiffs filed this suit against the defendant in April 1991. Although none of the defendant's pleadings raise the issue of the statute of limitations, the trial court, over the plaintiffs' objections, gave the jury an instruction on the defense.

An affirmative defense must be specifically pled to be considered. *Diefenbaugh v. Rachow*, 244 Neb. 631, 508 N.W.2d 575 (1993); *Nebraska Pub. Emp. v. City of Omaha*, 244 Neb. 328, 506 N.W.2d 686 (1993). "When it is not apparent from the face of the petition that the action is barred by the statute of limitations, the affirmative defense of the statute of limitations must be raised in the answer." *L.J. Vontz Constr. Co. v. Department of Roads*, 232 Neb. 241, 244, 440 N.W.2d 664, 665 (1989).

In this case, the plaintiffs' petition is not barred by the statute of limitations on its face. The defendant did not attempt to plead the statute of limitations as a defense, did not request any such instruction, and on appeal does not contend that the pleadings support the statute of limitations defense.

It is error to submit to the jury an issue which is not pleaded in the case. *Bump v. Firemens Ins. Co.*, 221 Neb. 678, 380 N.W.2d 268 (1986); *Simon v. Christie*, 210 Neb. 600, 316 N.W.2d 303 (1982). "It is more than mere probability that an instruction on a matter not an issue in litigation distracts a jury in its effort to answer legitimate, factual questions raised during trial." *Bump v. Firemens Ins. Co.*, 221 Neb. at 690, 380 N.W.2d at 277.

The instruction on the statute of limitations was prejudicial error. The remaining assigned errors in the plaintiffs' brief are without merit.

The judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

BOSLAUGH, J., participating on briefs.

ASSOCIATION OF COMMONWEALTH CLAIMANTS, AN UNINCORPORATED ASSOCIATION, APPELLANT, V. JAMES MOYLAN ET AL., APPELLEES.

517 N.W.2d 94

Filed June 3, 1994. No. S-92-835.

1. **Demurrer: Pleadings.** In considering a demurrer, a court must assume that the pleaded facts, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of facts not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial.
2. **Actions: Judicial Notice: Demurrer.** When cases are interwoven and interdependent and the controversy involved has already been considered and determined by the court in the former proceedings involving one of the parties now before it, the court has a right to examine its own records and take judicial notice of its own proceedings and judgments in the former action. Matters so judicially noticed are properly considered when determining the questions presented by a demurrer.
3. **Limitations of Actions: Time: Damages.** An action accrues and the statutory time within which the action must be filed begins to run when the injured party has the right to institute and maintain a lawsuit, although the party may not know the nature and extent of the damages.
4. **Statutes: Appeal and Error.** Statutory interpretation involves questions of law in connection with which an appellate court has an obligation to reach independent conclusions irrespective of the determinations made by the trial court.
5. **Statutes: Legislature: Intent: Appeal and Error.** In ascertaining the meaning of a statute, an appellate court must determine and give effect to the purpose and intent of the Legislature as demonstrated by the entire language of the statute.
6. **Statutes.** In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; when the words of a statute are plain, direct, and unambiguous, no construction is necessary or will be indulged to ascertain their meaning.
7. **Statutes: Legislature: Intent: Appeal and Error.** In determining the meaning of a statute, an appellate court may conjunctively consider and construe a collection

of statutes which pertain to a certain subject matter to determine the intent of the Legislature, so that different provisions of the act are consistent and sensible.

8. **Demurrer: Pleadings.** When a demurrer to a petition is sustained, a court must grant to the plaintiff leave to amend the petition unless it is clear that no reasonable possibility exists that amendments will correct the defect.
9. **Limitations of Actions: Pretrial Procedure.** In the application of statutes of limitations, discovery occurs when the party knows of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery of facts constituting the basis of the cause of action.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Affirmed.

Robert R. Gibson for appellant.

Rodney M. Confer and Trev E. Peterson, of Knudsen, Berkheimer, Richardson & Endacott; William D. Kuester, of Crosby, Guenzel, Davis, Kessner & Kuester; Thomas L. Kimer, of Faegre & Benson; Paul M. Schudel, of Woods & Aitken; Gerald Laughlin and Jill Robb Ackerman, of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim; Gregory Perry, of Perry, Guthery, Haase & Gessford, P.C.; and David A. Barron, of Cline, Williams, Wright, Johnson & Oldfather, for appellees Moylan et al.

James B. Cavanagh, of Lieben, Dahlk, Whitted, Houghton, Slowiaczek & Jahn, P.C., for appellees First National Bank and Dennis O'Neal.

BOSLAUGH, WHITE, FAHRNBRUCH, and LANPHIER, JJ., and CONNOLLY, HANNON, and IRWIN, Judges.

WHITE, J.

Association of Commonwealth Claimants appeals from the order of the district court sustaining appellees' demurrer and dismissing appellant's action. The district court held that appellant's action was barred by the 4-year statute of limitations set forth in Neb. Rev. Stat. § 25-207(3) and (4) (Reissue 1989). We affirm.

This is one of several cases related to the failure of Commonwealth Savings Company (Commonwealth). See, *Haman v. Marsh*, 237 Neb. 699, 467 N.W.2d 836 (1991);

Weimer v. Amen, 235 Neb. 287, 455 N.W.2d 145 (1990); *Association of Commonwealth Claimants v. Hake*, 2 Neb. App. 123, 507 N.W.2d 665 (1993). Appellant is an association consisting of persons who suffered losses because of the failure of Commonwealth. One of the purposes for which appellant was formed is to represent the interests of those persons who may have causes of action related to the failure of Commonwealth. Appellees are directors of the former Nebraska Depository Institution Guaranty Corporation (NDIGC) who also served as employees of other state financial institutions. Appellees also include other individuals who allegedly engaged in wrongful conduct which caused the failure of NDIGC in 1985. The actions asserted by appellant in this case are intended to remedy the injuries caused by the failure of NDIGC.

This appeal concerns the date on which appellant's actions accrued and whether such actions are barred by the applicable statute of limitations. Appellant contends that the actions accrued on or after January 4, 1985—the date on which NDIGC closed. Appellees contend that the actions accrued on or before November 8, 1983—the date on which Commonwealth was declared insolvent and a receiver was appointed. Appellant filed its petition on December 5, 1988. The causes of action alleged by appellant are governed by the 4-year statute of limitations set forth in § 25-207(3) and (4).

Commonwealth was an industrial loan and investment company in Lincoln, Nebraska, in which appellant's members were depositors. On November 1, 1983, the Nebraska Department of Banking and Finance declared Commonwealth insolvent. On November 8, the department was appointed receiver and liquidating agent for Commonwealth.

At the time of its insolvency, Commonwealth was a member institution of NDIGC. NDIGC was a corporation formed in accordance with the Nebraska Depository Institution Guaranty Corporation Act, Neb. Rev. Stat. §§ 21-17,127 to 21-17,145 (Reissue 1991). NDIGC was formed to protect and guarantee deposits, savings, and shareholdings held by member institutions such as Commonwealth. (We will refer to these various interests as deposits, and the owners of these interests as

depositors.) Pursuant to the NDIGC plan, each Commonwealth deposit was guaranteed for losses up to $30,000. On January 4, 1985, NDIGC closed without having satisfied its obligations owed to the Commonwealth depositors.

On December 5, 1988, appellant filed its petition against appellees. In its petition, appellant contends that the wrongful acts of appellees contributed to the collapse of NDIGC and that because of the collapse of NDIGC, NDIGC was unable to reorganize Commonwealth and Commonwealth depositors were unable to collect on the guaranties. Appellant asserts several theories as a basis for its action, as well as a claim for injuries to the rights of appellant's members.

Appellees filed a demurrer arguing, in part, that appellant's actions are barred by the statute of limitations. The district court granted appellees' demurrer because it found that the actions were time barred. The district court further found that this defect could not be cured by amendment.

Appellant contends that the district court erred in (1) finding that the action was barred, (2) "implicitly" finding that the petition did not on its face negate a statute of limitations defense, and (3) holding that the defect cannot be cured by amendment.

In considering a demurrer, a court must assume that the pleaded facts, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of facts not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial. *Hoiengs v. County of Adams*, 245 Neb. 877, 516 N.W.2d 223 (1994); *DeVaux v. DeVaux*, 245 Neb. 611, 514 N.W.2d 640 (1994); *Wheeler v. Nebraska State Bar Assn.*, 244 Neb. 786, 508 N.W.2d 917 (1993); *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.*, 244 Neb. 408, 507 N.W.2d 275 (1993).

In an effort to thoroughly address the issues raised in this appeal, we find it necessary to take judicial notice of the court records of a case previously considered by this court. When

> cases are interwoven and interdependent and the controversy involved has already been considered and

> determined by the court in the former proceedings involving one of the parties now before it, the court has a right to examine its own records and take judicial notice of its own proceedings and judgments in the former action. Matters so judicially noticed are properly considered when determining the questions presented by a demurrer.

Rhodes v. Yates, 210 Neb. 14, 15, 312 N.W.2d 680, 681 (1981). Accord, *Fowler v. Nat. Bank of Commerce*, 209 Neb. 861, 312 N.W.2d 269 (1981); *Knapp v. City of Omaha*, 175 Neb. 576, 122 N.W.2d 513 (1963). We take judicial notice of the records from the former proceedings in *Weimer v. Amen*, 235 Neb. 287, 455 N.W.2d 145 (1990). Those proceedings, in which appellant was a plaintiff, involved actions for relief of injuries caused by the failure of Commonwealth and included allegations of wrongful conduct substantially similar to that alleged in the petition in this case. Additionally, in considering appellees' demurrer, the Lancaster County District Court took judicial notice of its prior related proceeding in In the Matter of the State Tort Claim of the Department of Banking and Finance of the State of Nebraska, Receiver of Commonwealth Savings Company, docket 380, page 10 (In the Matter of the State Tort Claim). As that record has been included as part of the record in the case at bar, this court need not take judicial notice of that prior proceeding, but we may consider its contents as it relates to our analysis. See *LaPan v. Myers*, 241 Neb. 790, 491 N.W.2d 46 (1992) (considering the record of a prior proceeding of which the lower court had taken judicial notice).

Before considering the statute of limitations issue, we must determine whether appellant acquired its causes of actions by assignment from the receiver. Both parties have addressed the issues raised in this case as if the causes of action were assigned by the receiver to appellant. It appears that this presumption arises from our decision in *Weimer, supra*, which also involved actions related to the failure of Commonwealth. In *Weimer*, the plaintiffs, which included appellant, alleged that the defendants, which included many of the appellees in the case at bar, allegedly caused the failure of Commonwealth thereby injuring the plaintiffs.

On appeal, this court considered whether the plaintiffs were

the proper parties to bring those actions. This court stated that wrongs committed by a banking institution's officers and directors are wrongs against the institution itself and thus constitute a liability which is an asset of the bank. This court stated that a receiver has a duty to secure all the assets of the insolvent institution for the benefit of the institution and its creditors. We explained that the damage to the depositors was indirect and that generally, depositors do not have an individual right of action against such wrongdoers. Accordingly, we held that the receiver was the only party authorized to assert those actions. *Id.*

In the present case, appellant emphasizes in its brief that the causes of action asserted in the instant case—inability to satisfy the guaranties—are not based on injuries for which recovery was sought in prior Commonwealth actions. On this point, we agree with appellant, and we also find that the alleged wrongs committed by appellees do not create a liability which is an asset of Commonwealth.

Based on our understanding of the act, the causes of action asserted by appellant in this case arise from the inability of NDIGC to satisfy the guaranties which NDIGC owed directly to depositors of Commonwealth. Unlike the actions asserted in *Weimer, supra*, the actions in the present case are based on obligations owed to a depositor, and the failure of NDIGC to fulfill those obligations does not constitute a wrong committed against Commonwealth. Thus, any actions based on these obligations are not assets of Commonwealth. See, *Bliss v. Bryan*, 123 Neb. 461, 243 N.W. 625 (1932) (discussing the purpose of an earlier Nebraska deposit-guaranty fund and stating that the fund was established for the benefit of the depositors of insolvent banking institutions); *State, ex rel. Spillman, v. First State Bank*, 117 Neb. 370, 220 N.W. 579 (1928) (addressing a depositor's claim for recovery from a guaranty fund); *State, ex rel. Spillman, v. Citizens State Bank*, 115 Neb. 593, 214 N.W. 6 (1927); *State, ex rel. Spillman, v. Farmers State Bank of Dix*, 115 Neb. 574, 214 N.W. 4 (1927); *State, ex rel. Spillman, v. Farmers State Bank*, 115 Neb. 46, 211 N.W. 178 (1926); *United Wire v. Bd. of Savings & Loan*, 316 Md. 236, 558 A.2d 379 (1989) (assuming but not deciding that

the obligations owed by a private insurer of failed savings and loan institution may run directly to the depositors); *Tafflin v. Levitt*, 92 Md. App. 375, 608 A.2d 817 (1992) (finding that the guaranties owed by the depository insurer were not assets of the banking institution). See, generally, 10 Am. Jur. 2d *Banks* §§ 424 and 425 (1963) (discussing the purpose for deposit guaranty funds and what parties are entitled to the protection of such funds); 1A Michie on Banks and Banking ch. 1, § 18 (1993) (stating the purpose of state depository guaranty funds); 66 Am. Jur. 2d *Receivers* § 450 (1973) and 65 Am. Jur. 2d *Receivers* § 139 (1972) (describing what causes of action a receiver is authorized to enforce on behalf of depositors); 1A Michie, *supra*, ch. 1, §§ 27 and 32 (generally discussing what parties constitute "depositors" of an insolvent bank such that those parties are entitled to collect on the deposit guaranty).

If the causes of action in the present case are not assets of the bank, but, rather, individual actions of the depositors, then appellant's ability to assert those actions is not dependent on an assignment from the receiver. Although appellant secured an assignment from the receiver of any remaining causes of action which the receiver may have held, we nonetheless find that a determination of this appeal is not dependent on that assignment.

As stated above, the central issue with which we are presented is whether appellant's actions are barred by the 4-year statute of limitations. Neither party disputes that the actions are controlled by § 25-207, which provides that actions for injuries to the rights of the plaintiff and actions for relief on the ground of fraud can only be brought within 4 years from the date on which such actions accrued. We therefore must determine when the actions accrued.

An action accrues and the statutory time within which the action must be filed begins to run when the injured party has the right to institute and maintain a lawsuit, although the party may not know the nature and extent of the damages. *Bauers v. City of Lincoln*, 245 Neb. 632, 514 N.W.2d 625 (1994); *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.*, 244 Neb. 408, 507 N.W.2d 275 (1993); *Murphy v. Spelts-Schultz Lumber Co.*, 240 Neb. 275, 481 N.W.2d 422 (1992); *L.J. Vontz Constr.*

Co. v. Department of Roads, 232 Neb. 241, 440 N.W.2d 664 (1989); *Hoffman v. Reinke Mfg. Co.*, 227 Neb. 66, 416 N.W.2d 216 (1987); *Lake v. Piper, Jaffray & Hopwood Inc.*, 219 Neb. 731, 365 N.W.2d 838 (1985).

According to its petition, appellant's six causes of action arise from acts which occurred prior to November 1983. Appellant contends, however, that the actions did not accrue against appellees until the depositors were injured. Specifically, appellant contends that Commonwealth depositors were not injured until NDIGC was obligated to satisfy the guaranties or until the date on which NDIGC closed and became unable to satisfy such obligations. Appellant argues that NDIGC did not have an obligation to pay on the guaranties until liquidation of Commonwealth was complete and it was finally determined that the depositors would not be paid in full from the assets of Commonwealth. Appellant contends that when NDIGC closed on January 4, 1985, liquidation of Commonwealth was still not complete.

Appellees, on the other hand, argue that NDIGC became obligated on its guaranties when Commonwealth was declared insolvent and the receiver was appointed to liquidate its assets. It is undisputed that Commonwealth was declared insolvent on November 1, 1983, and that a receiver was appointed on November 8.

The basis of the parties' opposing theories regarding when appellant was injured rests on the interpretation of the statutes governing the obligations of NDIGC. Statutory interpretation involves questions of law in connection with which an appellate court has an obligation to reach independent conclusions irrespective of the determinations made by the trial court. *Malzahn v. Transit Authority*, 244 Neb. 425, 507 N.W.2d 289 (1993); *In re Application of City of Lexington*, 244 Neb. 62, 504 N.W.2d 532 (1993); *Calvert v. Roberts Dairy Co.*, 242 Neb. 664, 496 N.W.2d 491 (1993).

In ascertaining the meaning of a statute, an appellate court must determine and give effect to the purpose and intent of the Legislature as demonstrated by the entire language of the statute. *In re Application of City of Lexington, supra*; *In re Application of City of Lincoln*, 243 Neb. 458, 500 N.W.2d 183

(1993). In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; when the words of a statute are plain, direct, and unambiguous, no construction is necessary or will be indulged to ascertain their meaning. *Durand v. Western Surety Co.*, 245 Neb. 649, 514 N.W.2d 840 (1994); *Malzahn, supra*; *Arizona Motor Speedway v. Hoppe*, 244 Neb. 316, 506 N.W.2d 699 (1993); *In re Application of City of Lexington, supra*; *In re Application of City of Lincoln, supra*.

In determining the meaning of a statute, an appellate court may conjunctively consider and construe a collection of statutes which pertain to a certain subject matter to determine the intent of the Legislature, so that different provisions of the act are consistent and sensible. *AMISUB v. Board of Cty. Comrs. of Douglas Cty.*, 244 Neb. 657, 508 N.W.2d 827 (1993); *Metropolitan Life Ins. Co. v. Kissinger Farms*, 244 Neb. 620, 508 N.W.2d 568 (1993); *Arizona Motor Speedway, supra*; *In re Application of City of Lincoln, supra*.

The obligations of NDIGC are governed by the Nebraska Depository Institution Guaranty Corporation Act, under which NDIGC was incorporated and governed. See §§ 21-17,127 to 21-17,145. The Legislature has directed that the statutes within the act are to be liberally construed to effectuate the purposes set forth in § 21-17,128 and that those purposes shall provide a guide for the interpretation of the act. § 21-17,130.

The provisions of the act relevant to our discussion refer to the "member depository institution," the "corporation," and the "department." In the present case, Commonwealth is the member depository institution, NDIGC is the corporation, and Nebraska Department of Banking and Finance is the department. See § 21-17,131(6), (3), and (4). The guaranty provided by the NDIGC plan for each Commonwealth deposit was for losses up to $30,000.

A primary purpose of the act is to

> provide a mechanism whereby the shareholdings, savings, and deposits of any member or depositor of a member depository institution shall be protected or guaranteed up to amounts which are established by the corporation and

> to avoid excessive delay in payment of such shareholdings, savings, and deposits and to avoid financial loss to members or depositors of depository institutions because of the insolvency or liquidation of a member depository institution[.]

§ 21-17,128(1).

As stated above, we are concerned with the date on which the obligations of NDIGC to depositors arose. According to the act, corporations are

> obligated to the extent of the *covered claims* existing as of the date that a member depository institution becomes insolvent and goes into voluntary liquidation, or as of the date of the determination of liquidation by order of the department, but such obligation shall include only that amount of each covered claim which is less than or equal to the maximum amount established by the corporation.

(Emphasis supplied.) § 21-17,135(1)(a).

To determine when appellant's actions accrued, we must determine when a "covered claim" arose and when NDIGC became obligated to satisfy that claim. The act defines "covered claim" as

> any unpaid shareholdings, savings, or deposits of a member or depositor of a member depository institution and which is not in excess of the applicable amounts to which sections 21-17,127 to 21-17,145 apply as established by the plan of operation of the corporation, if such depository institution becomes insolvent and goes into voluntary liquidation or is placed in involuntary liquidation . . . .

§ 21-17,131(5).

Finally, the act provides that "any claimant recovering under sections 21-17,127 to 21-17,145 shall be deemed to have assigned all of his rights or interest in his shareholdings, savings, or deposits with the insolvent member depository institution to the corporation to the extent of his recovery from the corporation." § 21-17,138.

The Legislature directs us to liberally construe the language of the act in light of the objectives of the Legislature, which includes the intent to provide a mechanism whereby creditors of

insolvent institutions may recover their losses without excessive delay. § 21-17,128. The plain language of the act contemplates claims for the guaranties arising when liquidation commences. This is illustrated by the language used to define a "covered claim" and to describe the obligations of NDIGC to satisfy the guaranties. Specifically, § 21-17,131(5) indicates that a covered claim arises when an institution "becomes insolvent and *goes into* voluntary liquidation or *is placed* in involuntary liquidation by order of the department." (Emphasis supplied.) Section 21-17,135(1)(a) also employs the language "goes into" liquidation regarding the obligations of NDIGC. This language conveys the intent that completion of the liquidation process is not a condition precedent to the existence of a covered claim and the corresponding obligation of NDIGC to pay that claim.

This reading of the act is consistent with the actual bylaws adopted by NDIGC regarding the processing of "covered claims." In the Matter of the State Tort Claim, *supra* (exhibit C, "Index, Transcript of Testimony and Exhibits Presented at May 25, 1984, State Claims Board Meeting" at exhibit 8). Article XVI of the NDIGC bylaws provides that the depositors must make claims for the insurance within 18 months of the appointment of a liquidating receiver. If a depositor fails to file a claim within 18 months, the bylaws provide that all rights the depositor may have against NDIGC are barred. Similar to the language employed in the act, the bylaws define claims from the date on which a liquidating agent is appointed, which occurs at the beginning of the liquidation process, rather than from the date of final liquidation.

We therefore find that the plain language of the relevant statutes, when read together in a consistent and sensible manner, means that a covered claim arises when the institution is declared insolvent and is placed in liquidation or voluntarily goes into liquidation. The act does not require that the depositor wait until liquidation is completed before the depositor may claim the guaranty. On the contrary, we find that by the plain language of the act, the Legislature intended to provide depositors with an immediate remedy for the deposits which are held by the receiver during the liquidation process. Compare *United Wire v. Bd. of Savings & Loan*, 316 Md. 236,

558 A.2d 379 (1989), and *United Wire v. State Deposit Ins. Fund*, 307 Md. 148, 512 A.2d 1047 (1986) (discussing two cases arising from the Maryland savings and loan crisis and implicitly stating that the statutory language, "[u]pon final liquidation . . . the Fund Director shall . . . determine the amount of insurable loss" and provide "for the payment or assumption of an insurable loss to each depositor," Md. Fin. Inst. Code Ann. § 110.1(a) (1992), provided that insurance guaranty obligations did *not* arise until liquidation was complete. See Md. Fin. Inst. Code Ann., §§ 10-110.1(c)(2) and 10-110(a)(2)(iii) (1992)).

The issue then becomes when Commonwealth was declared insolvent and when Commonwealth was placed into liquidation. According to the petition, the department declared Commonwealth insolvent on November 1, 1983, and on November 8, the department was appointed receiver. Although the petition fails to state when Commonwealth went into liquidation, our records in *Weimer v. Amen*, 235 Neb. 287, 455 N.W.2d 147 (1990), state that on November 8, 1983, the Lancaster County District Court issued an order declaring Commonwealth insolvent and appointing the department as the receiver and liquidating agent of Commonwealth. See, also, *Association of Commonwealth Claimants v. Hake*, 2 Neb. App. 125, 507 N.W.2d 665 (1993).

When Commonwealth was declared insolvent and was placed into liquidation on November 8, 1983, the depositors' covered claims arose. Once there was a covered claim, NDIGC became obligated to satisfy the guaranty pursuant to § 21-17,135(a)(1). Once the obligations existed, appellant's causes of action accrued. Appellant's causes of action, therefore, accrued on November 8, 1983. The fact that appellant or its members did not attempt to enforce those obligations until 1988 did not prevent the running of the statute of limitations.

Appellant filed its petition on December 5, 1988. Appellant has not alleged facts sufficient to avoid the application of the 4-year statute of limitations. We therefore find that appellant's actions are barred.

The final issue we must address is whether the district court should have granted appellant leave to amend the petition.

When a demurrer to a petition is sustained, a court must grant to the plaintiff leave to amend the petition unless it is clear that no reasonable possibility exists that amendments will correct the defect. *Durand v. Western Surety Co.*, 245 Neb. 649, 514 N.W.2d 840 (1994); *DeVaux v. DeVaux*, 245 Neb. 611, 514 N.W.2d 640 (1994).

Upon a review of the petition, we find that as to appellant's actions for injury to appellant's rights, there is no reasonable possibility that appellant could amend the petition to remedy the defect. With regard to appellant's actions based on fraud, we recognize that although appellant's petition does not address when it discovered the fraudulent acts, § 25-207 provides that such actions are not deemed to have accrued until discovery of the fraud. As discussed above, the alleged fraudulent acts occurred prior to November 1983, and the obligations of NDIGC on which appellant rests its theory of recovery arose on November 8, 1983. The only means by which appellant's actions could survive the application of the statute of limitations would be if appellant can amend the petition and allege that appellant did not discover the fraud until after December 5, 1984.

In the application of statutes of limitations, discovery occurs when the party knows of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery of facts constituting the basis of the cause of action. *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.*, 244 Neb. 408, 507 N.W.2d 275 (1993); *Broekemeier Ford v. Clatanoff*, 240 Neb. 265, 481 N.W.2d 416 (1992); *League v. Vanice*, 221 Neb. 34, 374 N.W.2d 849 (1985).

After a thorough review of the petition and consideration of the prior action between these parties, we find that there is no reasonable possibility that appellant could amend its petition to allege facts which would establish that appellant did not discover or could not have reasonably discovered the fraud until such a time that its petition would not be barred by the statute of limitations. The record in *Weimer, supra*, reflects that the allegations of fraud attributed to the appellees in the instant case were asserted by approximately 150 Commonwealth depositors in an action filed on June 29, 1984, against the State

of Nebraska. Moreover, the record in *Weimer* shows those plaintiffs acknowledged that at the time they filed their petition, NDIGC was unable to satisfy the guaranties on the Commonwealth deposits. The *Weimer* record also includes various claims filed by the Commonwealth receiver in early 1984 against the State of Nebraska. Although made against the State, these claims involved alleged fraudulent acts which are substantially related to the alleged wrongful acts that appellant relies upon in the present case. Specifically, those claims included allegations that the State had conspired with NDIGC directors to commit fraudulent acts, and these claims requested that the State be held liable for the guaranty amount on each of the Commonwealth deposits. The court records in *Weimer, supra*, indicate that public notice was provided on numerous occasions regarding these claims and also for the public hearings which were conducted on the proposed settlements of those claims. Considering such circumstances, appellant cannot realistically contend that it did not discover or could not have reasonably discovered the alleged fraud until such a time that its actions would not be barred by the statute of limitations.

We therefore find that the actions are barred by the statute of limitations and that the district court properly denied appellant leave to amend its petition. The decision of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JAMES LINDSAY, APPELLANT.
517 N.W.2d 102

Filed June 3, 1994. No. S-92-1049.

1. **Postconviction: Proof.** In a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the Nebraska or federal Constitution, causing the judgment against the defendant to be void or voidable.
2. **Postconviction: Appeal and Error.** On appeal from a proceeding for postconviction relief, the trial court's findings of fact will be upheld unless such findings are clearly erroneous.

3. **Postconviction.** Once a motion for postconviction relief has been judicially determined, any subsequent motion for such relief from the same conviction and sentence may be dismissed unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time the prior motion was filed.
4. **Appeal and Error.** To be considered by an appellate court, a claimed prejudicial error must not only be assigned, but must be discussed in the brief of the asserting party.
5. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used to secure the review of issues which were or could have been litigated on direct appeal.
6. **Effectiveness of Counsel: Evidence: Appeal and Error.** Some types of attack upon effectiveness of counsel cannot be reached upon a direct appeal because the evidence which may bear upon such a determination is not shown in the trial record.
7. **Effectiveness of Counsel.** A pro se party is held to the same standards as one who is represented by counsel.
8. **Constitutional Law: Effectiveness of Counsel: Proof.** To state a claim of ineffective assistance of counsel as violative of the Sixth Amendment to the U.S. Constitution and thereby obtain reversal of a conviction, a defendant must show that his or her counsel's performance was deficient and that such deficient performance prejudiced the defense, that is, demonstrate a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different.
9. **Effectiveness of Counsel: Proof.** The standard for determining the propriety of a defendant's claim that his or her counsel's performance was deficient is whether the attorney, in representing the accused, performed at least as well as a lawyer with ordinary training and skill in the criminal law area.
10. **Trial: Effectiveness of Counsel: Presumptions.** In determining whether a trial counsel's performance was deficient, there is a strong presumption that such counsel acted reasonably.
11. **Trial: Effectiveness of Counsel: Witnesses.** The decision to call, or not to call, a particular witness, made by counsel as a matter of trial strategy, even if that choice proves unproductive, will not, without more, sustain a finding of ineffectiveness of counsel.
12. **Trial: Attorneys at Law.** Trial counsel is afforded due deference to formulate trial strategy and tactics.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Affirmed.

John P. Steichen, of Fellman, Moylan, Natvig & Steichen, for appellant.

Don Stenberg, Attorney General, and Mark D. Starr for appellee.

HASTINGS, C.J., WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ.

FAHRNBRUCH, J.

Claiming he received ineffective assistance of counsel at his trial for unlawful possession of a controlled substance with intent to deliver, James Lindsay seeks a reversal of the district court order denying his motion for postconviction relief.

We affirm the district court for Douglas County's order in all respects.

FACTS

At about 8 a.m. on June 7, 1991, Omaha police executed a search warrant at an Omaha residence where the appellant Lindsay and a woman named "Ronette Johnson" were found sleeping in the master bedroom.

The evidence seized by police during the search included (1) a rock of crack cocaine valued at between $50 and $100, found on the headboard of the waterbed in which Lindsay and Johnson were sleeping; (2) a bag of marijuana, found on the headboard; (3) a glass cigar tube, which tested positive for cocaine residue, found in the kitchen; (4) $1,200 cash in $100 bundles, found under the mattress of the bed; (5) a notepad with a list of six names, various dollar amounts next to each name, and the crossed-out words "coke" and "cola," found on a shelf on the east wall of the residence; (6) a digital pager, found in the master bedroom; (7) a plastic gram scale, which tested positive for cocaine residue, found in the living room; and (8) two cellular telephones, found in the master bedroom. Police officers testified at trial that each of these items was commonly used by drug dealers or related to drug dealing or drug usage.

The police also found several items indicating Lindsay's connection with the residence. They included (1) a billfold containing Lindsay's identification card and numerous scraps of paper with names and phone numbers, at least one of which matched a name on the seized notepad, found on the headboard; (2) a card addressed to Lindsay at the residence, with a postmark cancellation date of January 12, 1991, found in the master bedroom; (3) two vehicles in the backyard, which a police officer testified were registered in Lindsay's name; (4)

various articles of men's clothing, found in the master bedroom closet; (5) money order receipts showing payments to Lindsay, found on the headboard; and (6) an envelope of various papers relating to Lindsay's parole, found on the headboard.

Lindsay and Johnson, each represented by separate counsel, were tried as codefendants before a jury in the district court for Douglas County. Neither Lindsay nor Johnson testified at the trial. On December 9, 1991, the jury found Lindsay guilty of unlawful possession of a controlled substance with intent to deliver.

After the guilty verdict, Lindsay obtained new counsel and filed a motion for new trial, claiming he had newly discovered evidence. At the hearing on this motion, Johnson testified that at about 1:30 on the morning of the search, she and a girl friend had purchased the crack cocaine later seized by the police. Johnson testified that at about 4 a.m. she called Lindsay and asked him to come to her house. Johnson also testified that Lindsay had no knowledge that she had purchased the crack or that the crack was on the headboard of her bed. At the hearing, the State adduced evidence that Lindsay and his former trial counsel knew of Johnson's exculpatory statements before Lindsay's jury trial.

Finding that the evidence of Johnson's testimony was not newly discovered, the district court overruled Lindsay's new trial motion and subsequently sentenced Lindsay to not less than 5 nor more than 7 years' imprisonment. Lindsay's replacement counsel timely filed a notice of appeal on Lindsay's behalf. In April 1992, Lindsay notified the appellate court that he had dismissed his replacement attorney because of lack of communication.

Acting pro se, Lindsay filed a motion to dismiss his direct appeal without prejudice which was granted on August 12, 1992.

Still acting pro se, Lindsay, on October 9, 1992, filed with the district court for Douglas County motions for postconviction relief and appointment of counsel. In his motion for postconviction relief, Lindsay alleged that the district court had erred in overruling his motions to suppress physical evidence, to reinstate jurors, for a mistrial, to dismiss, and for new trial. In

addition, Lindsay claimed he had received ineffective assistance of counsel because his trial attorney failed to investigate Johnson's claims of his nonparticipation in the crime charged and to call Johnson as a witness. Finding that all of Lindsay's allegations could have been raised on direct appeal, the district court overruled his postconviction relief motion on October 21.

On November 3, 1992, Lindsay filed an amended motion for postconviction relief. In his amended motion, Lindsay alleged that (1) his trial attorney should have requested a separate trial and called Johnson to testify on Lindsay's behalf; (2) his second attorney failed to adequately investigate his prior counsel's actions; and (3) because his second attorney had constructively abandoned his case, Lindsay dismissed his appeal on the advice of an inmate at the Omaha Correctional Center (OCC) who Lindsay claims was "assigned by OCC staff to serve as legal aide to inmates." On November 6, the district court overruled Lindsay's motion to amend his postconviction motion because it was untimely, Lindsay's postconviction relief motion having been ruled upon and disposed of by the trial court's October 21 order.

Lindsay timely appealed to the Nebraska Court of Appeals the district court's October 21, 1992, order which denied his motion for postconviction relief. Under our authority to regulate the caseloads of the appellate courts of this state, we removed the matter to this court.

As his sole assignment of error on appeal, Lindsay claims that the district court erred in denying his motion for postconviction relief.

STANDARD OF REVIEW

In a motion for postconviction relief, the defendant must allege facts which, if proved, constitute a denial or violation of his or her rights under the Nebraska or federal Constitution, causing the judgment against the defendant to be void or voidable. *State v. Barrientos*, 245 Neb. 226, 512 N.W.2d 144 (1994). On appeal from a proceeding for postconviction relief, the trial court's findings of fact will be upheld unless such findings are clearly erroneous. *State v. Escamilla*, 245 Neb. 13, 511 N.W.2d 58 (1994).

ANALYSIS

We begin by noting that the district court correctly dismissed as untimely Lindsay's November 3, 1992, amended motion for postconviction relief. Once a motion for postconviction relief has been judicially determined, any subsequent motion for such relief from the same conviction and sentence may be dismissed unless the motion affirmatively shows on its face that the basis relied upon for relief was not available at the time the prior motion was filed. *State v. Luna*, 230 Neb. 966, 434 N.W.2d 526 (1989). The additional facts alleged in Lindsay's amended motion clearly were available at the time he filed his prior postconviction relief motion. Consequently, we need not consider any alleged new facts or issues raised in Lindsay's amended motion for postconviction relief.

Our review is further limited by Lindsay's brief on appeal. It only discusses Lindsay's claim of ineffective assistance of counsel at trial. To be considered by an appellate court, a claimed prejudicial error must not only be assigned, but must be discussed in the brief of the asserting party. Neb. Ct. R. of Prac. 9D(1)d (rev. 1992). See, also, *Brewer v. Brewer*, 244 Neb. 731, 509 N.W.2d 10 (1993); *Lange Indus. v. Hallam Grain Co.*, 244 Neb. 465, 507 N.W.2d 465 (1993). Therefore, we will not review the other grounds for postconviction relief raised by Lindsay in his motion to the district court. We will confine our consideration to Lindsay's claim of ineffective assistance of counsel at the trial level.

With regard to Lindsay's claim of ineffective assistance at trial, the district court found that Johnson's testimony was presented to the trial court at Lindsay's motion for new trial hearing and that the decision of Lindsay's trial counsel not to call Johnson as a witness could have been raised on direct appeal. We agree.

A motion for postconviction relief cannot be used to secure the review of issues which were or could have been litigated on direct appeal. *State v. Bowen*, 244 Neb. 204, 505 N.W.2d 682 (1993); *State v. Stewart*, 242 Neb. 712, 496 N.W.2d 524 (1993). Some types of attack upon effectiveness of counsel cannot be reached upon a direct appeal because the evidence which may bear upon such a determination is not shown in the trial record.

State v. Hert, 192 Neb. 751, 224 N.W.2d 188 (1974).

The trial record in this case discloses the relevant evidence bearing upon Lindsay's claim of ineffective assistance of trial counsel. The record discloses the content of Johnson's exculpatory statements, Lindsay's trial counsel's knowledge of those statements prior to trial, and trial counsel's failure to call Johnson as a witness. Based on this trial record, Lindsay could have litigated through direct appeal his claim of ineffective assistance of counsel.

Lindsay had employed a new attorney when he filed his direct appeal, but chose to dismiss the attorney and his direct appeal before a hearing on the direct appeal. Regardless of why or upon whose advice, Lindsay chose this course of action while acting pro se, and he must accept the consequences of his decision. A pro se party is held to the same standards as one who is represented by counsel. *State v. Bowen, supra*; *State v. Shepard*, 239 Neb. 639, 477 N.W.2d 567 (1991). The district court was not clearly wrong in denying Lindsay's motion for postconviction relief on the ground that his claim of ineffective assistance of trial counsel could have been litigated on direct appeal.

Moreover, a review of the record discloses that Lindsay's claim that his trial counsel rendered ineffective assistance is without merit. To state a claim of ineffective assistance of counsel as violative of the Sixth Amendment to the U.S. Constitution and thereby obtain reversal of a conviction, a defendant must show that his or her counsel's performance was deficient and that such deficient performance prejudiced the defense, that is, demonstrate a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *State v. Bowen, supra.*

The standard for determining the propriety of a defendant's claim that his or her counsel's performance was deficient is whether the attorney, in representing the accused, performed at least as well as a lawyer with ordinary training and skill in the criminal law area. See *State v. Nielsen*, 243 Neb. 202, 498 N.W.2d 527 (1993). In determining whether a trial counsel's performance was deficient, there is a strong presumption that such counsel acted reasonably. *Id.*

The decision to call, or not to call, a particular witness, made by counsel as a matter of trial strategy, even if that choice proves unproductive, will not, without more, sustain a finding of ineffectiveness of counsel. *Id.*; *State v. Evans*, 235 Neb. 575, 456 N.W.2d 739 (1990). Trial counsel is afforded due deference to formulate trial strategy and tactics. See, *State v. Navrkal*, 242 Neb. 861, 496 N.W.2d 532 (1993); *State v. Wickline*, 241 Neb. 488, 488 N.W.2d 581 (1992).

The record discloses that Lindsay's trial counsel knew before trial of Johnson's claims that she had purchased the crack cocaine and that Lindsay had no knowledge of the drugs. Indeed, during trial and in arguing Lindsay's motion to dismiss, trial counsel attempted to show that the evidence linking Lindsay with the residence was insufficient and that it was Johnson's crack cocaine. Nonetheless, Lindsay's trial counsel did not call Johnson to testify in support of this theory of defense.

Given the circumstances of this case, we find that trial counsel's decision not to call Johnson as a witness was a strategy decision within the range of reasonable professional assistance and that, therefore, trial counsel performed at least as well as a lawyer with ordinary training and skill in the criminal law area.

Johnson testified at the hearing on Lindsay's motion for new trial that her attorney had advised her prior to trial of her right to testify and that she had elected not to testify at trial.

Johnson did not claim at the hearing on Lindsay's motion for new trial nor has Lindsay alleged in this appeal that Johnson ever changed her mind about not testifying at trial. Because Johnson had elected not to testify at her and Lindsay's joint trial, it is likely that she would have asserted her right not to testify if Lindsay's trial counsel had called her as a witness in Johnson's behalf. Thus, Lindsay's trial counsel made a reasonable decision not to call Johnson as a witness.

Even assuming Johnson would have testified, the prosecutor could have elicited damaging testimony from her on cross-examination that would have emphasized the evidence connecting Lindsay with Johnson's residence or otherwise undermined Lindsay's defense. Because of the risk of any such detrimental testimony, the decision not to call Johnson as a

witness was reasonable trial strategy.

CONCLUSION

The district court was not clearly wrong in finding that Lindsay could have litigated his ineffective assistance of counsel claim on direct appeal. In any event, Lindsay has failed to establish that his trial counsel's assistance was deficient. The district court's denial of Lindsay's motion for postconviction relief is affirmed.

AFFIRMED.

BOSLAUGH, J., participating on briefs.

SHAKUR ABDULLAH, APPELLANT, V. NEBRASKA DEPARTMENT OF CORRECTIONAL SERVICES ET AL., APPELLEES.

517 N.W.2d 108

Filed June 10, 1994. No. S-92-512.

1. **Declaratory Judgments: Appeal and Error.** When a declaratory judgment action presents questions of law, an appellate court has an obligation to reach its conclusion independent from the conclusion reached by the trial court with regard to those questions.
2. **Pleadings: Proof.** A party will not be permitted to plead one cause of action and upon trial rely upon proof establishing another.
3. _____: _____. Proof must correspond with the allegations in the pleadings, and relief cannot be granted upon proof of a cause substantially different from the case made in the pleadings.
4. **Trial: Appeal and Error.** Issues not properly presented to and passed upon by a trial court may not be raised on appeal.
5. **Due Process: Prisoners.** In order to implicate the protections of the Due Process Clause, there must be a protectible liberty interest of the inmate's at stake.
6. **Due Process: Statutes.** A statute or rule may create a liberty interest protected by due process guarantees.
7. **Constitutional Law: Statutes.** To create a liberty interest, a state statute must place significant substantive restrictions on the decision-making process.
8. **Constitutional Law.** To obtain a protectible right, a person clearly must have more than an abstract need or desire for it. He or she must have more than a unilateral expectation of it. He or she must, instead, have a legitimate claim of entitlement to it.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Affirmed.

Shakur Abdullah, pro se.

Don Stenberg, Attorney General, and Terri M. Weeks for appellees.

Kenneth N. Thompson, amicus curiae.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, FAHRNBRUCH, and LANPHIER, JJ., and GRANT, J., Retired.

HASTINGS, C.J.

Shakur Abdullah, plaintiff, appeals from the judgment of the district court which, on his petition for declaratory judgment, denied his claim that a portion of the adult inmate classification manual of the Department of Correctional Services is unconstitutional. Abdullah assigns as error (1) the district court's finding that the nonpromulgation of the particular rule pursuant to Neb. Rev. Stat. § 84-901 et seq. (Reissue 1987 & Cum. Supp. 1992) was not an issue in the action and (2) the finding that Abdullah's automatic 3-year waiting period before he could become eligible for a custody change under the adult inmate classification manual did not violate the Due Process and Equal Protection Clauses of the federal or state Constitutions. We affirm.

When a declaratory judgment action presents questions of law, an appellate court has an obligation to reach its conclusion independent from the conclusion reached by the trial court with regard to those questions. *How v. Mars*, 245 Neb. 420, 513 N.W.2d 511 (1994); *National Am. Ins. Co. v. Continental Western Ins. Co.*, 243 Neb. 766, 502 N.W.2d 817 (1993).

Plaintiff Abdullah is an inmate of the Nebraska State Penitentiary currently serving a life sentence for first degree murder and a concurrent sentence of 15 to 50 years for shooting to kill or maim. See *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849 (1977). Abdullah testified that he was in maximum custody from 1975, when he entered the penitentiary, until 1983. Sometime during 1983, a new custody classification program was adopted which allowed his custody to be reduced to medium, and eventually, minimum custody. However, in 1985 the classification system was again revamped, and, according to Abdullah, minimum custody was summarily taken away from anyone in that classification. At that time, he was placed

in medium custody. During his incarceration, Abdullah has received several misconduct reports. The most recent report prior to this action was received on March 21, 1991.

On May 10, 1991, Abdullah's request for promotion to minimum custody was denied by the acting unit administrator, due to disciplinary reports received during the past 3 years. Abdullah appealed that decision as a "step one" grievance to chief executive officer and superintendent Howard Ferguson, who denied the appeal on May 23. Abdullah filed a "step two" grievance to the director of the Department of Correctional Services, Harold Clarke. The step two appeal was denied on June 5 by Clarke, who noted in his response that Abdullah had not stated any reason for his appeal.

For the purposes of inmate classification and assignments, the adult inmate classification manual provides:

> 1. LIFE TO LIFE (Class IA felony)
>
> Inmates serving a life sentence for a Class IA felony, in which the minimum sentence is also life, shall not be eligible for consideration for promotion to minimum custody until they have served at least ten (10) calendar years; and shall not be eligible for consideration for promotion to community custody until they have been granted a sentence commutation to a definite term of years by the Board of Pardons. Inmates shall be free of misconduct for the immediate past three (3) years to be considered for promotion to minimum or community custody grades.

Clarke testified that the overriding purpose of the classification system is, first, to protect the public, and also to facilitate rehabilitation, protect offenders, and aid in management of the department. He also explained that the reason for the requirement that a life-to-life inmate remain misconduct-free for 3 years prior to promotion is that it is the position of the department that those inmates are more dangerous individuals, and they are therefore expected to adhere to more stringent standards.

In determining whether an inmate may have a change in custody, an objective factoring system is employed, which evaluates issues such as the nature of the offender's crime, the

amount of time that a person might be serving, and the offender's adjustment within the facility.

The State alleged a lack of jurisdiction over this action, both by demurrer and answer in the trial court. Those defenses were denied. The district court found that Abdullah had failed to sustain his burden of proving that the contested rule regarding reclassification of inmates serving life-to-life sentences is invalid or unconstitutional and ordered his petition dismissed. Abdullah has appealed; the State has not cross-appealed.

Abdullah first asserts that the district court erred in finding that the nonpromulgation of the rule pursuant to § 84-901 et seq. was not an issue in the action. Abdullah's petition states only that "[t]he Defendants are currently executing an unpromulgated rule and or policy" (emphasis omitted) and goes on to assert that the rule is in violation of his equal protection rights. It does not allege that the rule should have been promulgated pursuant to § 84-901 et seq. or that the agency exceeded its statutory authority. The district court thus did not receive evidence or rule on the issue of promulgation of the adult inmate classification system; therefore, the issue is not properly before this court.

A party will not be permitted to plead one cause of action and upon trial rely upon proof establishing another. *Barker v. Wrehe*, 217 Neb. 793, 351 N.W.2d 412 (1984).

Proof must correspond with the allegations in the pleadings, and relief cannot be granted upon proof of a cause substantially different from the case made in the pleadings. *Id.*; *Badran v. Bertrand*, 210 Neb. 747, 316 N.W.2d 763 (1981).

Issues not properly presented to and passed upon by a trial court may not be raised on appeal. *In re Estate of Seidler*, 241 Neb. 402, 490 N.W.2d 453 (1992); *K & K Farming v. Federal Intermediate Credit Bank*, 237 Neb. 846, 468 N.W.2d 99 (1991).

As his second assignment of error, Abdullah asserts that the district court erred in finding that the appellees' automatic 3-year waiting period before Abdullah could become eligible for a custody change did not violate the Due Process and Equal Protection Clauses of the federal or state Constitutions. Abdullah alleges in his brief that there is a "great dissimilar treatment of residents as to when [a] misconduct report

(major/minor) will clear allowing them to become eligible for a custody change." Brief for appellant at 10. He further argues that

> "[t]he Equal Protection clause entitles similarly situated persons to equal treatment and or application of the law, rules and regulations, and the Appellant contends that the treatment he has received was dissimilar from the treatment that was afforded other residents within the [Department of Correctional Services] for receiving the same type of misconduct reports."

Brief for appellant at 16-17.

In *Turner v. Safley*, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987), inmates brought a class action challenging two regulations promulgated by the Missouri Division of Corrections. In reviewing the challenged regulations, the Court found:

> [W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests. In our view, such a standard is necessary if "prison administrators . . . , and not the courts, [are] to make the difficult judgments concerning institutional operations." *Jones v. North Carolina Prisoners' Union*, 433 U. S. [119, 128, 97 S. Ct. 2532, 53 L. Ed. 2d 629 (1977)]. Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration.

482 U.S. at 89.

Director Clarke was asked to explain the requirement that an inmate who is serving a life-to-life sentence remain misconduct-free for 3 years prior to being promoted to minimum custody. He stated:

> Quite simply, we felt one, the Parole Board requirement in part governs that they will not consider an offender who is serving life to life for any contacts within the community prior to having served at least ten years, and secondly, it is the position of the Department that those are more

> dangerous individuals within the Department of Correctional Services, and so therefore, they are expected to adhere to more stringent standards or higher standards for them.

Clarke stated that the only inmates serving under more stringent conditions than those serving life-to-life sentences are the offenders in death row. Clarke further explained that offenders who are serving "ten-to-life" are required to remain misconduct-free for 2 years rather than 3, because they are not considered as dangerous in the eyes of the courts and are therefore not required to adhere to the same standards. When asked to discuss why the department does not have a system to rate the various types of misconduct, he stated:

> Offenders are required to behave. They are required to conform to norms, rules and standards, and it's important that an offender who is serving a life sentence or ten-to-life sentence understand that they are going to be expected to adhere to rules and regulations and so forth. If they are not able to do so within prison, there is a reasonable expectation that they are not going to be able to adhere to those rules, regulations, et cetera, in a free society. So therefore, we do not rate them.

The challenged rule, which requires a life-to-life inmate to be misconduct-free for 3 years in order to be considered for promotion to minimum custody, is reasonably related to legitimate penological interests of protection of the public, protection of offenders, rehabilitation, and management of correctional institutions. Thus, the district court did not err in finding that Abdullah had failed to sustain his burden of proving that the contested rule is unconstitutional.

Although the record indicates that Abdullah received a hearing in regard to his March 1991 misconduct report, he apparently contends that due process requires a second hearing and "opportunity to be heard at said hearing to refute any previously received misconduct reports." Brief for appellant at 18.

In order to implicate the protections of the Due Process Clause, there must be a protectible liberty interest of the inmate's at stake. *Lynch v. Nebraska Dept. of Corr. Servs.*, 245

Neb. 603, 514 N.W.2d 310 (1994); *Billups v. Nebraska Dept. of Corr. Servs. Appeals Bd.*, 238 Neb. 39, 469 N.W.2d 120 (1991).

While Abdullah does not articulate the argument, a statute or rule may create a liberty interest protected by due process guarantees. See, *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 99 S. Ct. 2100, 60 L. Ed. 2d 668 (1979); *Wolff v. McDonnell*, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974); *Howard v. Grinage*, 6 F.3d 410 (6th Cir. 1993). However, as stated by the Eighth Circuit in *Flittie v. Solem*, 827 F.2d 276, 279 (8th Cir. 1987):

> [T]o create a liberty interest a state statute must place significant substantive restrictions on the decision making process. *Dace v. Mickelson*, 816 F.2d 1277, 1279-80 (8th Cir.1987) (en banc). Additionally, the statute must contain mandatory language similar to that in the statutes in issue in *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979). These "same standards apply to a review of a state rule, regulation, or practice . . . ." *Dace v. Mickelson*, 816 F.2d at 1279.

In *Greenholtz*, inmates of the Nebraska Penal and Correctional Complex brought a civil rights action against the Nebraska State Board of Parole, alleging due process violations in the board's consideration of the inmates' suitability for parole. The inmates argued that a protectible expectation of parole was created by statutory language which provided that the Board of Parole " '*shall* order [the offender's] release unless it is of the opinion that his release should be deferred because [of one of four reasons].' " (Emphasis supplied.) 442 U.S. at 11. The Supreme Court found that "the expectancy of release provided in this statute is entitled to some measure of constitutional protection. However, we emphasize that this statute has unique structure and language and thus whether any other state statute provides a protectible entitlement must be decided on a case-by-case basis." 442 U.S. at 12.

In examining the adult inmate classification and assignment regulations, we find no mandatory language which would give rise to an expectation of custody promotion. On the contrary, in addition to the language involving recent misconduct reports

which preclude promotion to a minimum custody classification, Abdullah also falls within a category of inmates who "shall *not* be promoted to minimum custody except after review by and upon approval of the Director's Review Committee," by virtue of the violent nature of his offense.

"[T]o obtain a protectible right 'a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.' " *Greenholtz*, 442 U.S. at 7.

Because prison inmates have no inherent due process right to have their security level downgraded, see *Howard v. Grinage, supra*, and the regulatory language did not itself create a protectible expectation of custody promotion, there is no merit to Abdullah's assertion that he was entitled to a hearing. See, also, *Abdullah v. Nebraska Dept. of Corr. Servs.*, 245 Neb. 545, 513 N.W.2d 877 (1994).

The judgment of the district court was correct, and it is affirmed.

AFFIRMED.

JEANIE VENTURA, APPELLANT AND CROSS-APPELLEE, V. STATE OF NEBRASKA EQUAL OPPORTUNITY COMMISSION, APPELLEE AND CROSS-APPELLANT, AND RAYMOND PINA, ALSO KNOWN AS RAYMOND PENA, APPELLEE.

517 N.W.2d 368

Filed June 10, 1994. Nos. S-92-950, S-93-466.

1. **Administrative Law: Judgments: Final Orders: Appeal and Error.** A judgment rendered or final order made by the district court pursuant to the Administrative Procedure Act may be reversed, vacated, or modified on appeal for errors appearing on the record.
2. **Judgments: Appeal and Error.** An appellate court, in reviewing a judgment of the district court for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings.
3. **Administrative Law: Time.** The procedures and procedural rules to be applied

are those in effect on the date of the hearing and not those in effect when the act or violation is charged to have taken place.

4. **Administrative Law.** An administrative body has no power or authority other than that specifically conferred by statute or by construction necessary to accomplish the plain purpose of the act.
5. _____. As a general rule, administrative agencies have no general judicial powers, notwithstanding that they may perform some quasi-judicial duties.
6. **Courts: Administrative Law.** Only a judicial tribunal, and not an administrative agency acting as a quasi-judicial tribunal, can provide relief that was "within the general power of the court" to provide.
7. **Discrimination: Evidence: Rebuttal Evidence: Proof.** Under the framework set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), for employment discrimination cases, a plaintiff, in a housing discrimination case, must establish a prima facie case of racial discrimination, which can be rebutted by the defendant by articulating a legitimate nondiscriminatory reason for its action. If the defendant articulates a nondiscriminatory reason for his action, then the plaintiff is given the opportunity to show that the landlord's or seller's stated reason was in fact a pretext for discrimination.
8. **Discrimination: Proof.** In order to establish a prima facie case of housing discrimination, the plaintiff must prove by a preponderance of the evidence (1) that he is a member of a racial minority, (2) that he applied for and was qualified to rent or purchase the housing, (3) that he was rejected, and (4) that the housing opportunity remained available.
9. _____: _____. The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.
10. **Discrimination: Presumptions: Proof.** Once the defendant articulates a nondiscriminatory reason for his action, the presumption established by the plaintiff's prima facie case is no longer relevant; instead, the trier of fact must then decide the ultimate question of whether the plaintiff has proven that the defendant intentionally discriminated against him because of his race.
11. **Discrimination: Proof.** Disbelief by the trier of fact of the defendant's reasons, coupled with the elements of a prima facie case, may be sufficient to show intentional discrimination without any additional proof.
12. **Discrimination: Words and Phrases: Evidence: Proof.** "Testers" are individuals who, without an intent to rent or purchase a home or apartment, pose as renters or purchasers for the purpose of collecting evidence of unlawful steering practices, and use of such evidence in proving housing discrimination is common and has been approved by the U.S. Supreme Court.
13. **Discrimination: Evidence.** A pretext may be found when the totality of the evidence presented leads the finder of fact to conclude that the proffered explanation is unworthy of credence.
14. **Service of Process: Legislature: Intent.** Where the Legislature has intended for service to be executed as a summons in civil cases, it has specifically stated so within the statutes.

15. **Demurrer: Pleadings: Appeal and Error.** In an appellate court's review of a ruling on a general demurrer, the court is required to accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the conclusions of the pleader.
16. **Administrative Law: Judgments.** An administrative agency's power to exercise judicial or quasi-judicial authority also implies the power to reconsider its own decision.
17. **Courts: Jurisdiction: Appeal and Error.** In civil appeals, after an appeal to an appellate court has been perfected, a lower court is without jurisdiction to hear a case involving the same matter between the same parties.
18. **Administrative Law: Judgments: Appeal and Error: Time.** The power of an administrative agency to reconsider its decision exists only until the aggrieved party files an appeal or the statutory appeal time has expired.
19. **Motions for New Trial: Appeal and Error.** The district court may hear a motion for new trial on the grounds of newly discovered evidence, if timely presented, although the cause is pending in a higher appellate court for review.
20. **Complaints: Discrimination: Parties.** Complainant is not a party of record where the Nebraska Equal Opportunity Commission has filed the original complaint on behalf of the complainant pursuant to Neb. Rev. Stat. § 20-333 (Reissue 1991).

Appeal from the District Court for Scotts Bluff County: ALFRED J. KORTUM, Judge. Affirmed in part, and in part reversed.

Robert M. Brenner, of Robert M. Brenner Law Office, for appellant.

Don Stenberg, Attorney General, Alfonza Whitaker, and Elaine A. Chapman for appellee State.

HASTINGS, C.J., BOSLAUGH, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ.

LANPHIER, J.

Two appeals concerning the same cause of action are the subject of this opinion, S-92-950 (*Ventura I*) and S-93-466 (*Ventura II*). These appeals involve a housing discrimination complaint filed by Raymond Pina with the Nebraska Equal Opportunity Commission (Commission). The district court affirmed the decision of the Commission finding that Jeanie Ventura had engaged in illegal discrimination. Ventura appealed. That appeal is the subject of *Ventura I*. During the pendency of the appeal to the Nebraska Court of Appeals, Ventura filed a motion for new trial with the Commission on the

grounds of newly discovered evidence. The Commission denied the motion. Ventura filed a petition for judicial review, and the district court dismissed the motion in part for lack of jurisdiction because of the pending appeal of the underlying case. Ventura appealed. The latter appeal is the subject of *Ventura II*. Subsequently, *Ventura I* was moved to our docket, and we moved *Ventura II* as well to address the jurisdictional questions which arose from the filing of the second appeal.

FACTS

Raymond Pina, who is Mexican-American, was searching for an apartment or duplex in Gering, Nebraska, in July 1991. He saw an advertisement in the newspaper listing the unit in question. On July 17, at approximately 9:30 a.m., he called the telephone number in the newspaper and was told that the unit was available. At approximately 10:30 a.m., after driving by the unit, Pina called the number again and spoke to Ventura. He told Ventura that he wanted the apartment and that he would like to see it. When Pina gave Ventura his name, Ventura told him the unit had already been rented.

Later that same day, Pina spoke to Deborah Surber, a Caucasian coworker, about the incident. It appeared strange to her that the unit had rented within an hour after Pina had expressed an interest in it. She agreed to inquire about the unit in order to determine whether there was any discrimination involved in Ventura's decision not to rent the unit to Pina.

At approximately 1:30 p.m. on the same day, Surber contacted Ventura for information on the unit, and she was given an appointment to see it at 2:30 p.m. After examining the unit, Surber told Ventura she would take the unit, and agreed to return by 3:30 with a deposit check. Ventura informed Surber that she needed to submit the deposit by 3:30 because shortly thereafter another prospective tenant would be examining the unit.

As Surber was leaving, Pina returned to the unit and asked Ventura to show him the unit. Ventura stated that she had rented the unit to Surber. Pina left and then returned to the unit shortly after 3:30. He attempted to explain to Ventura that Surber and her husband did not want the unit and stated that he would like

to rent the unit. Ventura did not allow Pina to see the apartment, and told him that another woman had an appointment to view it at 4 p.m.

The following day, several other individuals of Mexican-American descent called Ventura seeking to examine the unit. Rita Sabala and Ben Castinado testified that they called for information on the unit and were told the unit was still available. Castinado used Martinez as his last name when he called Ventura. They testified that after they stated their surnames to Ventura, Ventura became evasive and would not agree to a definite time when they could see the unit.

Garold Newton, a Caucasian, also called for the unit on July 18. Newton also stated his full name to Ventura. Newton testified that although Ventura stated she could not show him the unit on that day, she set an appointment on the following day for 5:30 p.m. The following day he learned that it had been rented to Charles Haggard, a Caucasian, later the prior evening.

Evidence presented at the hearing revealed that with the exception of one Hispanic that Ventura knew, the unit in question was rented only to Caucasians. In addition, the evidence also showed that the units with the highest monthly rental rates were rented to Caucasians, while the lower rental rate units were rented to people of Mexican descent. The hearing officer found that Ventura intentionally discriminated against Pina because of his national origin and that she intentionally maintained a policy of discrimination against potential renters of the residence who were of Hispanic descent. In awarding relief, the hearing officer awarded Pina $5,000 in damages for emotional distress. Pursuant to Neb. Rev. Stat. § 20-338 (Reissue 1991), the Commission issued a final order on June 19, 1992, adopting the findings of fact and conclusions of the hearing examiner. The district court affirmed the decision of the Commission.

The jurisdictional question arises from the separate appeals on the underlying case. Ventura appealed the decision of the district court to the Court of Appeals, *Ventura I*. During the pendency of this appeal, Ventura filed with the Commission a motion for new trial on the grounds of newly discovered

evidence. The Commission denied the motion, and the district court affirmed on the basis, in part, that it lacked jurisdiction because of the pending appeal of the underlying action. Ventura appeals that decision as well, *Ventura II*.

ASSIGNMENTS OF ERROR

In *Ventura I*, Ventura asserts the district court erred in not finding that (1) the order of the Commission and the damages it awarded were contrary to law and the evidence, (2) the Commission did not establish a prima facie case of housing discrimination, (3) Ventura's reasons for not renting the unit to Pina were not pretextual, (4) the Commission erred in awarding emotional damages, (5) there had not been compliance with the notice to make election provisions under Neb. Rev. Stat. §§ 20-333(2) and 20-335 (Reissue 1991), and (6) the Commission had not complied with all statutory procedural provisions of the law of conciliation.

On cross-appeal, the Commission asserts that the district court erred in affirming the $5,000 award of compensatory damages for emotional distress, the award being too small to fully compensate Pina.

In *Ventura II*, Ventura asserts the district court erred in (1) sustaining the Commission's demurrer without giving Ventura the opportunity to amend her petition for judicial review and (2) sustaining the Commission's demurrer on the grounds that it did not have jurisdiction to hear the matter because of the pendency of the first appeal on the underlying action.

STANDARD OF REVIEW

A judgment rendered or final order made by the district court pursuant to the Administrative Procedure Act may be reversed, vacated, or modified on appeal for errors appearing on the record. Neb. Rev. Stat. § 84-918(3) (Cum. Supp. 1992). An appellate court, in reviewing a judgment of the district court for errors appearing on the record, will not substitute its factual findings for those of the district court where competent evidence supports those findings. *Bell Fed. Credit Union v. Christianson*, 244 Neb. 267, 505 N.W.2d 710 (1993).

APPLICABLE LAW

NEBRASKA CIVIL RIGHTS ACT OF 1969 V. NEBRASKA FAIR HOUSING ACT

Ventura raises a question of whether the appropriate law was applied by the hearing officer. The alleged discrimination occurred on July 17, 1991. At that time, the law in effect was the Nebraska Civil Rights Act of 1969, Neb. Rev. Stat. §§ 20-105 through 20-125, 48-1102, and 48-1116 (Reissue 1987 & Cum. Supp. 1990). At the time the two-part hearing took place, January 29 and February 12, 1992, the current statute addressing housing discrimination, the Nebraska Fair Housing Act, Neb. Rev. Stat. §§ 20-301 through 20-344 (Reissue 1991), was in effect. We will refer to these two acts as the old law and the new law, respectively.

The relevant substantive provisions of the old law regarding impermissible discrimination in housing remain the same. See §§ 20-107 and 20-318. The relevant procedural differences between the two statutes are the methods by which an aggrieved person may seek relief. See §§ 20-114 through 20-119 and §§ 20-326 through 20-337. Under the old law, once a determination was made by the Commission that probable cause existed to credit the allegations of the aggrieved person, and informal methods of conciliation proved fruitless, then the Commission could commence an action in the district court. Under former § 20-118, the district court would hear the case as if it were sitting on a civil case. After a hearing, if the district court found that there was discrimination, then it was authorized to provide relief as specified under § 20-118, including taking "such other action as is within the general power of the court to insure justice and carry out the purposes of [the civil rights act]."

The relevant sections of the new law created a procedure by which relief can be sought by an aggrieved person after the Commission has investigated and made a determination that a discriminatory practice has occurred. Under the new law, the Commission then issues a charge against the respondent. The aggrieved person or the respondent may elect to have the matter determined in a civil action. If no election is made, then the

respondent is provided an opportunity for a hearing before an officer appointed by the Commission. See §§ 20-333 and 20-336. If the hearing officer finds that discrimination has occurred, then he can issue an order of relief for the aggrieved party. See §§ 20-337 and 20-338.

SUBSTANTIVE V. PROCEDURAL

At the hearing, the hearing officer used the substantive portions of the old law in assessing damages and the procedural provisions of the new law. In short, the procedural rules of the new law authorized the Commission to bring a charge of discrimination against Ventura on behalf of Pina and provide her with a hearing before a hearing officer after informal methods of conciliation had failed. See §§ 20-333 to 20-337. We find this was proper, because we have generally held that the procedures and procedural rules to be applied are those in effect on the date of the hearing and not those in effect when the act or violation is charged to have taken place. See *Durousseau v. Nebraska State Racing Commission*, 194 Neb. 288, 231 N.W.2d 566 (1975). Therefore, although Ventura was subject to the substantive portions of the old law, the newly operative law governed the procedural aspects of the case.

COMPENSATORY DAMAGES

However, the question remains as to the propriety of the hearing officer's imposing compensatory damages upon Ventura. The hearing officer found that Ventura had discriminated against Pina. The hearing officer's order cited §§ 20-117 and 20-118 as the applicable provisions for determining the relief which should be granted. Section 20-118 stated:

> Actions brought pursuant to section 20-117, shall be subject to the rules of procedure for other civil actions in the district courts . . . . In considering and determining such actions, the court shall have the authority to:
>
> (2) Grant temporary or permanent injunctions or restraining orders or other orders which will effectuate the purposes of sections 20-105 to 20-125, 48-1102, and 48-1116;
>
> . . . .

> (7) Take such other action as is *within the general power of the court* to insure justice and carry out the purposes of sections 20-105 to 20-125, 48-1102, and 48-1116.

(Emphasis supplied.)

An administrative body has no power or authority other than that specifically conferred by statute or by construction necessary to accomplish the plain purpose of the act. *NAPE v. Game & Parks Comm.*, 220 Neb. 883, 374 N.W.2d 46 (1985). In addition, as a general rule, administrative agencies have no general judicial powers, notwithstanding that they may perform some quasi-judicial duties. *Transport Workers of America v. Transit Auth. of City of Omaha*, 205 Neb. 26, 286 N.W.2d 102 (1979). The hearing officer cited § 20-118(7) as authorizing him to award compensatory damages for Pina's emotional distress. Section 20-118(7) authorized the "district courts" to take such other action, in addition to those actions specified in the statute, "as is within the general power of the court" to take. Thus, under the old law, the district court alone was authorized to provide relief which included taking "such other action as is within the general power of the court to insure justice and carry out the purposes of [the civil rights act]." § 20-118. However, the hearing officer could not take additional action under this section, because an agency has no general judicial powers. Accordingly, his power to afford relief was limited to exercising only those remedies specifically provided by § 20-118. In issuing the order for compensatory damages for Pina's emotional distress, the hearing officer went beyond his powers. Therefore, the award for compensatory damages for $5,000 was improper. This conclusion precludes the Commission's asserted error on cross-appeal that these damages are inadequate.

HOUSING DISCRIMINATION

ELEMENTS

Ventura's first three assignments of error combine to assert that the evidence presented at the hearing was insufficient as a matter of law to prove that Ventura discriminated against Pina. In determining whether Pina was entitled to relief, we look to federal decisions for guidance, since the antidiscrimination acts

are patterned after federal law. See *Zalkins Peerless Co. v. Nebraska Equal Opp. Comm.*, 217 Neb. 289, 348 N.W.2d 846 (1984).

Ventura alleges that the Commission failed to establish a prima facie case of discrimination. One of the principal cases establishing the prima facie elements for employment discrimination cases is *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). In *McDonnell Douglas Corp.*, the Court held that the plaintiff must establish a prima facie case of racial discrimination, which can be rebutted by the defendant by articulating a legitimate nondiscriminatory reason for its action. If the defendant articulates a nondiscriminatory reason for his action, then the plaintiff is given the opportunity to show that the employer's stated reason was in fact a pretext for discrimination. *Id.* Federal courts have held that the *McDonnell Douglas Corp.* test also applies in cases brought under the Fair Housing Act. See, *U.S. v. Badgett*, 976 F.2d 1176 (8th Cir. 1992); *Secretary, HUD on behalf of Herron v. Blackwell*, 908 F.2d 864 (11th Cir. 1990). Therefore, in order to establish a prima facie case of housing discrimination, the plaintiff must prove by a preponderance of the evidence (1) that he is a member of a racial minority, (2) that he applied for and was qualified to rent or purchase the housing, (3) that he was rejected, and (4) that the housing opportunity remained available. *Blackwell, supra.* In *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981), the Court stated that the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.

The U.S. Supreme Court recently reaffirmed the holdings of *McDonnell Douglas Corp.* and *Burdine* in *St. Mary's Honor Center v. Hicks*, ____ U.S. ____, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993). In *St. Mary's Honor Center v. Hicks*, an employment discrimination case, the district court found that the respondent had established a prima facie case of racial discrimination in employment by proving that (1) he was black, (2) he was qualified for the position he held, (3) he was demoted and ultimately discharged, and (4) the position remained open

and was ultimately filled by a white man. The district court also found that the reasons given by the employer petitioner for its action were not the real reasons for demoting and discharging the respondent. Nevertheless, the district court did not grant the respondent relief because it found that the respondent had failed to carry his ultimate burden of proving that respondent's race was the determining factor in the employer's decision to demote and discharge him.

On appeal, the U.S. Court of Appeals for the Eighth Circuit reversed because it found that once the plaintiff proved that the employer's proffered reasons for the actions taken against the respondent were pretextual, the respondent was entitled to judgment as a matter of law. See *Hicks v. St. Mary's Honor Center*, 970 F.2d 487 (8th Cir. 1992).

The U.S. Supreme Court reversed the Court of Appeals decision. The Court noted that the presumption established by *McDonnell Douglas Corp.* was a procedural device designed to establish an order of proof and production. The Court stated that the framework set forth in *McDonnell Douglas Corp.* and *Burdine* established an allocation of the burden of production and an order for the presentation of proof in title VII discriminatory-treatment cases and did not relieve the respondent of retaining the ultimate burden of persuading the trier of fact that the petitioner had intentionally discriminated against the respondent. See *St. Mary's Honor Center v. Hicks, supra.*

The Court held that if the defendant succeeds in carrying its burden of production, then

> the *McDonnell Douglas* framework—with its presumptions and burdens—is no longer relevant. To resurrect it later, after the trier of fact has determined that what was "produced" to meet the burden of production is not credible, flies in the face of our holding in *Burdine* that to rebut the presumption "[t]he defendant need not persuade the court that it was actually motivated by the proffered reasons." . . . The presumption, having fulfilled its role of forcing the defendant to come forward with some response, simply drops out of the picture. . . . The defendant's "production" (whatever its persuasive effect)

> having been made, the trier of fact proceeds to decide the ultimate question: whether plaintiff has proven "that the defendant intentionally discriminated against [him]" because of his race . . . .

(Citations omitted.) *St. Mary's Honor Center v. Hicks*, 113 S. Ct. at 2749.

Thus, under *St. Mary's Honor Center v. Hicks*, the plaintiff is entitled to judgment only if the plaintiff persuades the trier of fact that intentional racial discrimination was the cause of the negative treatment by the defendant. Rejection of a defendant's proffered reasons does not compel a judgment for the plaintiff, since the plaintiff always retains the ultimate burden of persuasion. *Id.* Furthermore, although the trier of fact finds that the defendant's reasons for its negative treatment of the plaintiff are not legitimate, the plaintiff nevertheless retains the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against him. "It is not enough, in other words, to *dis*believe the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination." *Id.*, 113 S. Ct. at 2754.

However, the Court also noted that disbelief by the trier of fact of the defendant's reasons, coupled with the elements of a prima facie case, may be sufficient to show intentional discrimination without any additional proof. See *St. Mary's Honor Center v. Hicks, supra.*

APPLICATION TO THIS CASE

The hearing officer found that the Commission had met the prima facie case requirements. It established that Pina was a Mexican-American, that he applied to and was qualified to rent the unit, that he was rejected from renting the Ventura unit, and that after Pina was rejected, the unit remained available. Ventura denied that she refused to show or rent the unit to Pina. She met her burden of producing a nondiscriminatory reason by stating that she would not rent the apartment to Pina after Surber saw the unit because Pina was "mean" to her, and she would not rent the apartment to someone who was mean to her.

The hearing officer found that the Commission succeeded in proving that Ventura's articulated reasons were pretexts. The

Commission introduced the testimony of various "testers." "Testers" are individuals who, "without an intent to rent or purchase a home or apartment, pose as renters or purchasers for the purpose of collecting evidence of unlawful steering practices." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373, 102 S. Ct. 1114, 71 L. Ed. 2d 214 (1982). The use of tester evidence in proving housing discrimination is common and has been approved by the U.S. Supreme Court in *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 S. Ct. 1601, 60 L. Ed. 2d 66 (1979).

The tester evidence showed that Ventura told Pina the unit was rented after he gave Ventura his last name, which is Hispanic. Thereafter, Ventura told a Caucasian tester, Surber, that the unit was still available and made arrangements for her to inspect the unit. After inspecting the unit, Surber agreed to take the unit, and agreed to return by 3:30 that afternoon with a deposit check. Ventura informed Surber that she would be showing the unit to someone else shortly after 3:30 if she did not return with the deposit check by that time. Shortly after 3:30, Pina returned and asked to see the unit. Ventura refused to show him the unit and stated that another person would be viewing the apartment at 4 p.m. Ventura claimed that she did not want to show Pina the unit because he was mean to her, and she would not rent the unit to someone who was mean to her. However, there was no indication that Pina was rude to her in the initial telephone contacts with Ventura when she gave him the address to the unit and then when she informed him that the unit was no longer available upon learning his Hispanic surname.

In addition, on the following day, two other Mexican-American individuals called Ventura for information about the unit and later stated that after they provided a Hispanic last name, Ventura would not agree to a time when she could show them the apartment. In contrast, when another Caucasian, Newton, called for the unit later that same day, Ventura set an appointment for 5:30 p.m. on the following day. Newton also gave Ventura his full name. Newton did not see the unit the next day because it had been rented to another Caucasian individual the prior evening.

In addition to the tester testimony, there was other evidence to support Pina's allegations in the rental pattern practiced by Ventura. Exhibit 7 showed that the units which rented at the highest rates were occupied by Caucasians, while units with the lower rental rates were occupied by individuals with Hispanic surnames. The evidence demonstrated that Ventura refused to show or rent to Pina because of his national origin.

Ventura denied refusing to show or rent the unit to Pina because of his national origin. She stated that she would not rent the unit to Pina because he was mean to her. Ventura's statement that Pina was mean to her referred to the second time he attempted to see the unit. There was no indication that when he originally sought to look at the unit, during the 10:30 a.m. phone conversation with Ventura, he was rude to her. Therefore, Ventura could not credibly be heard to say that she refused to show or to rent the unit to Pina because he was mean to her when she first rejected his attempts to secure the unit. The Court in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 256, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981), stated that a pretext may be found when the totality of the evidence presented leads the finder of fact to conclude that the "proffered explanation is unworthy of credence." We agree with the hearing officer, finding that Ventura's proffered reasons were not worthy of credence.

Under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973); *Burdine, supra*; and the subsequent case *St. Mary's Honor Center v. Hicks*, ____ U.S. ____, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993), we find that Pina successfully carried his burden of persuading the court that Ventura had intentionally discriminated against him.

NOTICE

Ventura claims that the Commission failed to serve her with the charge and information on election for civil action, as required by § 20-333(2)(a). Determination of this issue requires a brief overview of the procedure for seeking a remedy under the Nebraska Fair Housing Act. Under § 20-326, an aggrieved person files a complaint with the Commission alleging discriminatory practice. After this complaint is filed, the

Commission must serve notice on the respondent, "identifying the alleged discriminatory housing practice and advising such respondent of the procedural rights and obligations of respondents under the act, together with a copy of the original complaint." § 20-326(1)(b)(ii). Thereafter, the Commission investigates the complaint, and if it determines that reasonable cause exists to believe that discrimination occurred, then it must issue a charge of discrimination on behalf of the aggrieved person. § 20-333. After a charge is issued by the Commission, the Commission must "cause" a copy of the charge, along with additional information specified in the statute, to be served on the respondent.

Ventura does not argue that she was not personally served with the original complaint pursuant to § 20-326. Her allegation is that she was not properly served with the charge under § 20-333 because a copy of the charge, accompanied by the required information, was sent to her attorney of record, Robert Brenner. Under Neb. Rev. Stat. § 25-534 (Reissue 1989), the Commission was authorized to serve the notice of the charge to Ventura's attorney of record. Section 25-534 states:

> Whenever in any action or proceeding, any order, motion, notice, or other document, except a summons, is required by statute or rule of the Supreme Court to be served upon or given to any party represented by an attorney whose appearance has been noted on the record . . . such service or notice may be made upon or given to such attorney, unless service upon the party himself or herself is ordered by the court.

Ventura asserts that § 25-534 is inapplicable because the issuance of the charge amounts to a summons, which is not subject to the provisions of § 25-534. We find this statement unpersuasive. Generally, a summons is an instrument used to provide notice to a party of civil proceedings and of the opportunity to appear and be heard. *State ex rel. Ill. Farmers v. Gallagher*, 811 S.W.2d 353 (Mo. 1991). It is also used as a means of acquiring jurisdiction over a party. *Id.* Section 20-333 states in relevant part:

> (2) After the commission issues a charge under this section, the commission shall cause a copy of the charge,

> together with information as to how to make an election under section 20-335 and the effect of such an election, to be served:
>
> (a) On each respondent named in the charge, together with a notice of opportunity for a hearing at a time and place specified in the notice, unless such an election is made....

Although the notice requirements in § 20-333 serve a similar purpose as a summons by notifying the respondent of the pendency of a hearing, there is nothing in the statute which requires it to be served as a summons in a civil case. Where the Legislature has intended for service to be executed as a summons in civil cases, it has specifically stated so within the statutes. See Neb. Rev. Stat. §§ 48-174 and 48-190 (Reissue 1988) (upon filing a petition in workers' compensation cases, a summons shall be served upon the adverse party, as in civil cases, together with a copy of the petition); Neb. Rev. Stat. § 84-917 (Cum. Supp. 1992) (petition for judicial review under Administrative Procedure Act: "Summons shall be served . . . in the manner provided for service of a summons in a civil action"); Neb. Rev. Stat. § 83-1027 (Reissue 1987) (in mental health commitment hearings, district court required to cause a summons to be prepared and issued to sheriff, who shall "personally serve" upon the subject the summons and copy of the petition). Thus, if the Legislature had intended the notice in § 20-333 to be served as a summons in civil cases, then it would have made it clear in the statute. Therefore, the Commission's service of the charge upon Ventura's attorney of record was permissible under § 25-534, since § 20-333 did not require any particular form of service. See, also, *Ranger Division v. Bayne*, 214 Neb. 251, 333 N.W.2d 891 (1983) (substantial compliance with notice requirement where service is made upon attorney of record, and no particular form of service is prescribed by statute).

Ventura's remaining assignment of error regarding conciliation is meritless, since the record reflects that conciliation was attempted and failed.

We also do not address the Commission's cross-appeal, as the issue of damages has been disposed of.

VENTURA II

We now address Ventura's second appeal to this court. Ventura's original appeal was based on the determination of the district court that the hearing officer's findings were proper. During the pendency of that appeal, Ventura filed with the Commission a motion for new trial based on newly discovered evidence. The hearing officer denied the motion on January 22, 1993, after finding that the "newly discovered evidence" was evidence which was in existence prior to the public hearing and that the exercise of due diligence before the public hearing would have produced the information. The order became final on February 22, 1993, as set forth in § 20-338. On March 4, Ventura filed a petition for judicial review of the denial of the motion for new trial. The Commission filed a demurrer. The petition named the Commission and Pina as respondents. On April 27, the district court dismissed the petition, finding that it had no jurisdiction over the subject matter, that there was a defect in the parties respondent, and that the petition did not state facts sufficient to constitute a cause of action.

Ventura filed a motion for new trial in the district court on May 4, 1993. The district court properly refused to consider the motion because it was improper pleading. See *Hueftle v. Northeast Tech. Community College*, 242 Neb. 685, 496 N.W.2d 506 (1993) (motion for new trial not properly filed in district court acting as an appellate court). Ventura appealed the April 27 and May 4 decisions on May 26, but addresses only the former decision in her brief. Accordingly, we address only the issues raised by the April 27 decision. See *Hamilton v. City of Omaha*, 243 Neb. 253, 498 N.W.2d 555 (1993) (this court will not consider assignments of error which are not discussed in the brief).

Ventura claims the district court erred in sustaining the Commission's demurrer because it did not have subject matter jurisdiction over the action because of the pendency of the other appeal, *Ventura I*. In addition, Ventura claims the district court erred in sustaining the demurrer on the grounds that there was a defect in the parties respondent and that Ventura failed to state facts sufficient to constitute a cause of action, without giving Ventura the opportunity to amend her petition for judicial

review.

A demurrer which challenges the sufficiency of the allegations is a general one. In our review of a ruling on a general demurrer, this court is required to accept as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the conclusions of the pleader. *LaPan v. Myers*, 241 Neb. 790, 491 N.W.2d 46 (1992).

It is an abuse of discretion by the court " ' "to sustain a demurrer without leave to amend where there is a reasonable possibility that the defect can be cured by amendment, particularly in the case of an original complaint." . . .' " *Newman Grove Creamery Co. v. Deaver*, 208 Neb. 178, 183, 302 N.W.2d 697, 701 (1981). Accord *LaPan v. Myers, supra.*

NEW TRIAL

Ventura claims that the pendency of the appeal of the original action did not preclude the district court from considering her motion for new trial based on newly discovered evidence. We agree. The statute authorizing a party to file a motion for new trial, Neb. Rev. Stat. § 25-1143 (Reissue 1989), requires that an application for a new trial must be made within 10 days, either within or without the term, after the verdict, report, or decision was rendered, except for the cause of newly discovered evidence which the applying party could not, with reasonable diligence, have discovered and produced at trial. When newly discovered evidence is the grounds for a motion for new trial, Neb. Rev. Stat. § 25-1145 (Reissue 1989) requires the motion to be filed within 1 year after the final judgment was rendered.

Although there is no statutory provision which gives the Commission the authority to reconsider its order, we have stated that an administrative agency's power to exercise judicial or quasi-judicial authority also implies the power to reconsider its own decision. See *Bockbrader v. Department of Insts.*, 220 Neb. 17, 367 N.W.2d 721 (1985).

The issue is whether an administrative agency may reconsider its decision after an appeal of the underlying case has been filed. In civil appeals, after an appeal to this court has been perfected, a lower court is without jurisdiction to hear a case

involving the same matter between the same parties. *Bell Fed. Credit Union v. Christianson*, 237 Neb. 519, 466 N.W.2d 546 (1991); *Zeeb v. Delicious Foods*, 231 Neb. 358, 436 N.W.2d 190 (1989). See, also, *Nuttelman v. Julch*, 228 Neb. 750, 424 N.W.2d 333 (1988), *cert. denied* 489 U.S 1031, 109 S. Ct. 1167, 103 L. Ed. 2d 225 (1989) (after jurisdiction has vested in the Nebraska Supreme Court, any order made by the district court is void and of no effect). This is also true for administrative agencies. In *Morris v. Wright*, 221 Neb. 837, 381 N.W.2d 139 (1986), this court held that the power of an administrative agency to reconsider its decision exists only until the aggrieved party files an appeal or the statutory appeal time has expired. Under these principles, it would appear that the Commission and the district court were precluded from hearing Ventura's motion for new trial because jurisdiction had vested in this court.

However, we have also held that under the statutes authorizing a new trial on the grounds of newly discovered evidence, if timely presented, a motion may be entertained by the district court although the cause is pending in this court for review. *Hellman v. Adler*, 60 Neb. 580, 83 N.W. 846 (1900).

> A party desiring to obtain a new trial . . . has, therefore, the right in every case to make his application within one year from the date of the judgment in the district court, and that court has authority to entertain his petition and grant the relief demanded, although the cause may be pending for review in this court.

Id. at 582, 83 N.W. at 847.

Other cases addressing this issue have held similarly. In *State v. Youngstrom*, 191 Neb. 112, 214 N.W.2d 27 (1974), the defendant, after perfecting his appeal to this court, had filed a motion in the trial court asking the court to vacate his sentence. On appeal, this court found that all proceedings occurring after the appeal had been perfected were void because "the authority of the District Court, after appeal to this court has been perfected, seems limited to granting a new trial on the basis of the newly discovered evidence." *Id.* at 117, 214 N.W.2d at 30.

In *Smith v. State*, 167 Neb. 492, 93 N.W.2d 499 (1958), this court addressed the question of jurisdiction of the district court

to hear a motion for new trial during the pendency of a proceeding in the Supreme Court. The defendant filed a motion for new trial on the grounds of newly discovered evidence after filing for review by a petition in error in this court. The district court found that jurisdiction to consider it was suspended during the pendency of this court's review, unless this court gave the district court permission to consider the motion. This court found that the district court had jurisdiction to hear the motion for new trial without first acquiring permission from this court to consider the motion for new trial.

> There is nothing in the statutes stating or indicating that consideration shall be delayed until after the decision on review by the Supreme Court of a conviction of a criminal offense on petition in error, unless permission to hear and determine is granted by this court. No decisions have been cited or found indicating that there should be any such delay. Reason appears to indicate that the legislative intent was that the two proceedings as such should be conducted separately and independently of each other, and that such independent conduct by the district court could not be regarded as an invasion of the jurisdiction of the Supreme Court.
>
> It is to be observed of course that a motion for new trial is directed to the trial court. . . . There is no provision for filing such a motion elsewhere. . . . At no point is the right to file or to have an original adjudication upon it related to a proceeding for review. Specifically the statute relating to the filing of a motion for new trial on the ground of newly discovered evidence . . . contains no restrictions upon the jurisdiction of that court to hear and make an adjudication on the sufficiency or merits of the motion at any time after it has been filed.
>
> Undoubtedly in a case where there had been a conviction and a review on petition in error by the Supreme Court resulting in affirmance a motion, if filed within 3 years, would be proper. If the district court properly sustained the motion the conviction and its affirmance would be nullified and a new trial would become necessary. Reasonably therefore it may not well be

> said that the exercise of this original jurisdiction of the trial court must be delayed and required to depend upon final disposition of the proceeding for review or upon consent of the reviewing court, when no such restriction of power is declared. If there are valid grounds for re-examination on the basis of newly discovered evidence to ascertain whether or not a person has been wrongfully convicted the steps provided for such re-examination should be taken timely and without undue delay.

Id. at 494-95, 93 N.W.2d at 500-01.

The principles set forth in *Hellman*, *Smith*, and *Youngstrom* can properly be applied in this case to permit the Commission to hear a motion for new trial based on newly discovered evidence although an appeal is pending. If a party that had appealed an administrative agency decision was obligated to wait until after the appeal had been disposed of to file a motion for new trial based on newly discovered evidence, then a situation could arise in which the party would be left without a remedy. The statute authorizing a new trial limits the time in which a motion for new trial may be made on the grounds of newly discovered evidence to 1 year. See § 25-1145. If an appeal is not disposed of until after 1 year had expired, then a party would be without any remedy regardless of the merit of his motion for new trial. Since a motion for new trial may appropriately be filed only in a trial court, the party would be precluded from seeking relief in this court as well. See, *Hueftle v. Northeast Tech. Community College*, 242 Neb. 685, 496 N.W.2d 506 (1993); *Booker v. Nebraska State Patrol*, 239 Neb. 687, 477 N.W.2d 805 (1991).

Given that the statute requires the party seeking the new trial to exercise diligence once the newly found evidence is discovered, it follows that the party should be permitted to file such a motion at the earliest date possible; otherwise, the party would face dismissal because the motion is untimely or because the party failed to show due diligence.

PARTY RESPONDENT AND SUFFICIENCY OF FACTS

PARTY RESPONDENT

Ventura asserts that the district court erred when it found

that there was an error in the parties respondent. Under § 84-917(2)(a), which governs proceedings for judicial review of the decision of an administrative agency, "[a]ll parties of record shall be made parties to the proceedings for review." The party of record before the hearing examiner and throughout the entire litigation has been the Commission, although acting on behalf of Pina. Pina was not a party of record because the Commission had filed the original complaint on behalf of Pina. Had Pina elected to file a civil suit on his own behalf, then he would have been a "party of record." We find support for this conclusion in § 20-340, which permits an aggrieved party to intervene as a matter of right if he elects to have the matter asserted in a civil action. However, naming Pina as a respondent, alone, would not warrant the sustaining of a demurrer because it did not affect the substantial rights of the Commission, and it could easily be remedied.

Sufficiency of Facts Pled

It is the facts well pleaded, not the theory of recovery or legal conclusions, which state a cause of action, and a petition is sufficient if, from the statement of facts set forth in the petition, the law entitles the plaintiff to recover. *Ruwe v. Farmers Mut. United Ins. Co.*, 238 Neb. 67, 469 N.W.2d 129 (1991). Ventura's petition is insufficient because it is replete with conclusions of law and is devoid of any facts which would entitle her to relief. Although a petitioner generally is provided with the opportunity to amend the pleading where there is a reasonable possibility that the defect can be cured by amendment, the district court did not abuse its discretion in dismissing the petition for judicial review. On its face, the petition completely lacked any factual allegations which would entitle the plaintiff to relief. Therefore, the order of the district court is affirmed.

CONCLUSION

The district court was correct in finding in *Ventura I* that Ventura had intentionally discriminated against Pina in refusing to show or rent to him. However, the Commission lacked authority to assess damages. In addition, although the district court could properly have considered Ventura's appeal

of the hearing officer's denial of the motion for new trial based on newly discovered evidence, it properly dismissed the petition because it failed to state facts sufficient to state a cause of action.

AFFIRMED IN PART, AND IN PART REVERSED.

WHITE, J., participating on briefs.

KAREN KROPP, APPELLANT AND CROSS-APPELLEE, V. GRAND ISLAND PUBLIC SCHOOL DISTRICT NO. 2, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLANT.

517 N.W.2d 113

Filed June 10, 1994. No. S-92-977.

1. **Administrative Law: Jurisdiction: Appeal and Error.** Petition-in-error jurisdiction is limited by statute to a review of a judgment rendered or final order made by any tribunal, board, or officer exercising judicial functions and inferior in jurisdiction to the district court.
2. **Administrative Law: Appeal and Error.** For petition-in-error purposes, a board exercises a judicial function if it decides a dispute of adjudicative fact or if a statute requires it to act in a judicial manner.
3. **Evidence: Proof: Words and Phrases.** Adjudicative facts are facts which relate to a specific party and are adduced from formal proof. Adjudicative facts pertain to questions of who did what, where, when, how, why, and with what motive or intent. They are roughly the kind of facts which would go to a jury in a jury case.
4. **Contracts.** In interpreting a contract, a court must first determine, as a matter of law, whether the contract is ambiguous.
5. **Contracts: Words and Phrases.** A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings.
6. **Contracts.** The meaning of an unambiguous contract is a question of law.
7. _____. The meaning of an ambiguous contract is generally a question of fact.
8. **Contracts: Intent.** When a contract is unambiguous, the intentions of the parties must be determined from the contract itself.
9. **Contracts.** A court is not free to rewrite a contract or to speculate as to terms of the contract which the parties have not seen fit to include.
10. **Commission of Industrial Relations: Labor and Labor Relations: Public Officers and Employees.** Neb. Rev. Stat. § 48-816(2) (Reissue 1988) does not require public employers to act in a judicial manner when administering

grievances; it authorizes public employers to recognize employee organizations for the purpose of collective bargaining in the administration of grievances.

Appeal from the District Court for Hall County: JOSEPH D. MARTIN, Judge. Reversed and remanded with directions to dismiss.

Scott J. Norby, of McGuire and Norby, for appellant.

Gregory H. Perry, of Perry, Guthery, Haase & Gessford, P.C., for appellee.

HASTINGS, C.J., BOSLAUGH, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ.

PER CURIAM.

A teacher instituted error proceedings following the denial of her grievance by the school board. The district court affirmed the school board's action, and the teacher appealed. We reverse, and the cause is remanded with directions to dismiss the petition in error.

Karen Kropp is a teacher in the Grand Island Public Schools. The present dispute concerns her placement on past and present salary schedules. The salary schedules are part of a negotiated agreement between Grand Island Public School District No. 2 (school district) and the Grand Island Education Association.

In August 1987, Kropp received a master's degree. After receiving her degree, Kropp applied for an advancement on the salary schedule. In March 1988, Kropp's request was granted, and she advanced to the master's-level pay scale.

In September 1991, Kropp read a "taxpayer ad" in the newspaper, listing teachers and their salaries. Kropp noticed that another teacher with equal experience and less education was making more money than Kropp. After some investigation, Kropp determined that her 1988 placement had been incorrect. Kropp concluded that as a result of this error, her current placement on the schedule and her corresponding salary are lower than they should be.

Kropp instituted grievance proceedings requesting that her placement on the salary schedule be adjusted. Kropp sought and was granted a hearing before the grievance committee of the Grand Island school board (school board). The grievance

committee found that Kropp was entitled to the requested adjustment in her placement. The school board, however, rejected the grievance committee's recommendation and denied Kropp's requested adjustment.

Kropp filed a petition in error in the district court, and the court affirmed the school board's decision. Kropp appealed, and the school district cross-appealed. Under our authority to regulate the caseloads of the appellate courts of this state, we removed the matter to this court.

On appeal, Kropp asserts that the district court erred in finding that sufficient evidence existed to support the decision of the school board. On cross-appeal, the school district assigns three errors which together constitute an assertion that the district court erred in failing to dismiss the petition for lack of jurisdiction.

We begin with the jurisdictional question, as it takes logical precedence over Kropp's assignment of error. The school district argues that the district court did not have jurisdiction because the school board was not exercising a judicial function. We agree.

Petition-in-error jurisdiction is limited by statute to a review of "[a] judgment rendered or final order . . . made by any tribunal, board, or officer exercising judicial functions and inferior in jurisdiction to the district court." Neb. Rev. Stat. § 25-1901 (Reissue 1989). A board exercises a judicial function if it decides a dispute of adjudicative fact or if a statute requires it to act in a judicial manner. *Thomas v. Lincoln Public Schools*, 228 Neb. 11, 421 N.W.2d 8 (1988); *Richardson v. Board of Education*, 206 Neb. 18, 290 N.W.2d 803 (1980); *Kosmicki v. Kowalski*, 184 Neb. 639, 171 N.W.2d 172 (1969); *School Dist. No. 23 v. School Dist. No. 11*, 181 Neb. 305, 148 N.W.2d 301 (1967).

We first consider whether the board decided any dispute of adjudicative fact. "Adjudicative facts" are facts which relate to a specific party and are adduced from formal proof. *Van Fossen v. Board of Governors*, 228 Neb. 579, 423 N.W.2d 458 (1988); *State v. Freeman*, 440 P.2d 744 (Okla. 1968). Adjudicative facts pertain to questions of who did what, where, when, how, why, and with what motive or intent. *Wood County*

Bank v. Camp, 348 F. Supp. 1321 (D.D.C. 1972); *People v Forbush*, 170 Mich. App. 294, 427 N.W.2d 622 (1988). They are roughly the kind of facts which would go to a jury in a jury case. *Grason Elec. v. Sacramento Municipal Utility Dist.*, 571 F. Supp. 1504 (E.D. Cal. 1983), *rev'd on other grounds and remanded* 770 F.2d 833 (9th Cir. 1985); *Wood County Bank, supra.*

In order for us to determine whether the school board decided a dispute of adjudicative fact, we must examine Kropp's claim in greater detail. The school district's salary schedule contains columns which correspond to a teacher's level of education. For example, placement in the "MA-36" column would mean that a teacher had earned a master's degree plus 36 additional credit hours.

The columns on the salary schedule were changed between the 1986-87 agreement and the 1987-88 agreement. The 1986-87 agreement included the following sequence: BA-18, BA-45/MA. The 1987-88 agreement included the following sequence: BA-18, BA-36, MA. The 1987-88 agreement also provided that a certificated staff member, such as Kropp, could not advance more than one column in 1 fiscal year.

The parties agree that during 1986-87, Kropp was placed in the BA-18 column. The parties also agree that in March 1988, Kropp was placed in the MA column. The only real dispute is whether this 1988 placement was proper. To decide this dispute, the school board needed to interpret the contract.

It will be helpful to review some basic principles of contract interpretation. In setting out these principles, we emphasize that we are not considering the substance of the school board's decision; we are merely attempting to determine whether the school board decided any dispute of adjudicative fact.

In interpreting a contract, a court must first determine, as a matter of law, whether the contract is ambiguous. *Murphy v. City of Lincoln*, 245 Neb. 707, 515 N.W.2d 413 (1994); *Plambeck v. Union Pacific RR. Co.*, 244 Neb. 780, 509 N.W.2d 17 (1993). A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings. *Murphy, supra*; *Plambeck, supra*. The meaning of an

unambiguous contract is a question of law. *Husen v. Husen*, 241 Neb. 10, 487 N.W.2d 269 (1992); *Spittler v. Nicola*, 239 Neb. 972, 479 N.W.2d 803 (1992). In contrast, the meaning of an ambiguous contract is generally a question of fact. *Plambeck, supra*; *Schwindt v. Dynamic Air, Inc.*, 243 Neb. 600, 501 N.W.2d 297 (1993).

Thus, in order to find that the school board decided a dispute of adjudicative fact, we would have to find that the contract was ambiguous and that the school board determined the meaning of the contract. This we cannot do, for the contract is not ambiguous. The contract plainly states that certificated employees cannot move more than one column per year.

At the hearing, the school administration did not claim that the one-column-per-year provision was ambiguous. Instead, through the testimony of Marvin D. Maurer, superintendent of the Grand Island public school system, the administration contended that the one-column-per-year rule did not apply when an employee changed degree levels, that is, went from a bachelor's degree to a master's degree. This contention, however, is merely an attempt to demonstrate the intent of the parties with respect to the contract. When a contract is unambiguous, the intentions of the parties must be determined from the contract itself. *Properties Inv. Group v. Applied Communications*, 242 Neb. 464, 495 N.W.2d 483 (1993); *Husen, supra*. A court is not free to rewrite a contract or to speculate as to terms of the contract which the parties have not seen fit to include. *Metropolitan Life Ins. Co. v. Beaty*, 242 Neb. 169, 493 N.W.2d 627 (1993); *Rees v. Huffman*, 222 Neb. 493, 384 N.W.2d 631 (1986).

The school board did not decide any dispute of adjudicative fact. The parties agreed as to Kropp's actual placements on the school district's salary schedule and the times those placements occurred. In deciding whether Kropp's placement was proper, the school board needed to apply the terms of the contract. Because the contract is unambiguous, the school board did not need to determine the factual question of the intent of the parties. In short, the school board determined solely questions of law.

We next consider whether any statute required the school

board to act in a judicial manner. Kropp refers us to two statutes.

Kropp first cites Neb. Rev. Stat. § 48-816(2) (Reissue 1988), which provides, in pertinent part: "[P]ublic employers are hereby authorized to recognize employee organizations for the purpose of negotiating collectively in the determination of and administration of grievances arising under the terms and conditions of employment . . . ." This statute does not *require* public employers to act in a judicial manner when administering grievances. Insofar as the statute has any relevance to Kropp's claim, it *authorizes* public employers to recognize employee organizations for the purpose of collective bargaining in the administration of grievances. Cf. *Kuhl v. Skinner*, 245 Neb. 794, 515 N.W.2d 641 (1994). That is, if a grievance arises and the public employees seek collective bargaining, then the public employer is authorized to recognize employee organizations for the purpose of such collective bargaining.

Kropp next cites Neb. Rev. Stat. § 79-12,109 (Reissue 1987), which authorizes a superintendent to "take action with regard to a certificated employee's performance or conduct . . . including: (1) Counseling; (2) oral reprimand; (3) written reprimand; and (4) suspension without pay for not to exceed thirty working days." Section 79-12,109 also specifies certain procedures which must be followed if a superintendent takes action under subdivisions (3) or (4) above. We have recognized that a school board exercises certain judicial functions under § 79-12,109. See *Thomas v. Lincoln Public Schools*, 228 Neb. 11, 421 N.W.2d 8 (1988).

Section 79-12,109 does not apply to Kropp's claim. This is not a teacher discipline case. The superintendent did not take action with regard to Kropp's performance or conduct; Kropp took action with regard to her pay, requesting a change in her placement on the salary schedule. The superintendent simply denied her request.

Neither of the two statutes cited by Kropp requires the school board to act in a judicial manner when hearing pay-scale grievances. We have not found any other statutes which would place such a requirement upon the school board.

The school board did not decide any dispute of adjudicative fact and was not statutorily required to act in a judicial manner. Therefore, the orders of the school board in this case are not reviewable by proceedings in error. The fact that Kropp's claim cannot be reviewed by a proceeding in error, we emphasize, does not prevent her from filing an appropriate action. Accord *Thomas, supra*.

We conclude that the district court lacked jurisdiction to hear Kropp's petition in error. In light of this conclusion, it is unnecessary to address Kropp's assignment of error. The judgment is reversed and the cause remanded with directions to dismiss the petition in error.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

WHITE, J., participating on briefs.

JULIE A. MCDONALD, APPELLEE, V. CHERYL MILLER, APPELLANT.

518 N.W.2d 80

Filed June 10, 1994. No. S-92-1015.

1. **Rules of Evidence.** In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not by judicial discretion, except in those instances under the Nebraska Evidence Rules when judicial discretion is a factor involved in the admissibility of evidence.
2. **Verdicts: Appeal and Error.** A jury verdict will not be disturbed on appeal unless it is so clearly against the weight and reasonableness of the evidence and so disproportionate as to indicate that it was the result of passion, prejudice, mistake, or some other means not apparent in the record, or that the jury disregarded the evidence or rules of law.
3. **Trial: Evidence: Appeal and Error.** To constitute reversible error in a civil case, the admission or exclusion of evidence must unfairly prejudice a substantial right of a litigant complaining about evidence admitted or excluded.
4. **Trial: Witnesses: Appeal and Error.** The trial court is given discretion in determining whether a witness is qualified to state his opinion, and such determination will not be disturbed on appeal absent an abuse of discretion.
5. **Evidence: Appeal and Error.** Testimony objected to which is substantially similar to evidence admitted without objection results in no prejudicial error.
6. **Trial: Expert Witnesses.** The admissibility of expert testimony depends on

whether specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. It is for the trial court to make the initial decision on whether the testimony will assist the trier of fact.

7. **Trial: Expert Witnesses: Appeal and Error.** A trial court's ruling in receiving or excluding an expert's testimony which is otherwise relevant will be reversed only when there has been an abuse of discretion.
8. **Damages: Appeal and Error.** The amount of damages to be awarded is a determination solely for the fact finder, and its action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of the damages proved.
9. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on a claim of an erroneous instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
10. **Appeal and Error.** To be considered by an appellate court, an error must be assigned and discussed in the brief of one claiming that prejudicial error has occurred.

Appeal from the District Court for Saunders County: EVERETT O. INBODY, Judge. Affirmed.

Alan L. Plessman for appellant.

Gordon R. Hauptman and Matthew A. Lathrop, of Hauptman, O'Brien, Wolf & Lathrop, P.C., for appellee.

HASTINGS, C.J., WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ.

WRIGHT, J.

Julie A. McDonald sued Cheryl Miller for injuries sustained by McDonald in a boating accident on July 4, 1989. A jury awarded McDonald $73,000, and Miller appeals. We affirm.

SCOPE OF REVIEW

In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not by judicial discretion, except in those instances under the Nebraska Evidence Rules when judicial discretion is a factor involved in the admissibility of evidence. *McDermott v. Platte Cty. Ag. Socy.*, 245 Neb. 698, 515 N.W.2d 121 (1994).

A jury verdict will not be disturbed on appeal unless it is so clearly against the weight and reasonableness of the evidence and so disproportionate as to indicate that it was the result of

passion, prejudice, mistake, or some other means not apparent in the record, or that the jury disregarded the evidence or rules of law. *Sanwick v. Jenson*, 244 Neb. 607, 508 N.W.2d 267 (1993).

FACTS

On October 18, 1991, McDonald commenced an action against Miller in which McDonald sought damages for injuries she suffered as the result of a July 4, 1989, boating accident. McDonald was a passenger in a boat (Marquardt boat) which was struck by a boat operated by Miller. McDonald alleged that Miller failed to maintain a proper lookout; failed to yield the right-of-way; failed to maintain reasonable control of the boat; and failed to turn aside, swerve, or otherwise avoid striking the boat which was carrying McDonald. She claimed serious and permanent injuries as a result of the accident.

Before trial, the parties stipulated that Miller was operating a boat on Thomas Lake on July 4, 1989; that McDonald was in another boat at that time; and that a collision occurred. They stipulated that the hospital and medical expenses were fair and reasonable for the services provided.

The Marquardt boat was driven by Irvin Vrana. Dan Marquardt was water-skiing behind the boat, which was owned by his father. As the boat passed through a channel, Marquardt fell. Vrana throttled back and dragged the ski rope around to Marquardt. During this time, Vrana noticed the Miller boat approaching and decided not to proceed until it had passed.

Miller testified that as she navigated about the lake, she was originally traveling at approximately 30 m.p.h. and that the boat was level to the water. When the water became choppy, she slowed the boat to approximately 15 m.p.h., which, according to Miller, raised the front of the boat and limited her vision. She continued around the lake in this manner while visiting with passengers in the boat.

Vrana testified that while the Marquardt boat was stationary, the Miller boat drew closer and closer. The bow of the Miller boat was raised in the air, and Vrana could not see the driver of the boat. As the Miller boat approached, Vrana became concerned, stood up, and began shouting, but he failed

to attract Miller's attention. He then moved toward the front of the boat, stood on the seats in the bow, and began yelling and waving.

Bradley Pfeiffer was on the beach and heard Vrana yelling. Pfeiffer testified that the Marquardt boat was stopped, that the women in the boat driven by Miller were talking back and forth, and that the driver of the Miller boat was facing sideways, as if talking to someone next to her.

Miller testified that she became aware of the Marquardt boat when she was approximately 20 feet away and that she heard a man yelling at approximately the same time. McDonald testified that prior to the collision, she was facing the back of the boat and talking with Marquardt, who was in the water. After Vrana indicated the Miller boat was approaching, McDonald turned to look as Vrana began waving his hands. Next, according to McDonald, "it hit." McDonald testified that the Miller boat slid up on her back, pushed her head and face down into the Marquardt boat, and "clamped" her head down on the boat.

Pfeiffer testified that as the boats collided, half of the Miller boat went up onto the Marquardt boat, slid across the top of the Marquardt boat, and then slid back down into the water. Pfeiffer, an emergency medical technician, swam to the Marquardt boat, applied a stabilizing hold to McDonald's neck, and immobilized McDonald's back until a rescue squad arrived. The rescue squad placed McDonald on a backboard and applied a "C-collar."

McDonald testified that the day after the accident, she had a black eye and swelling over her other eye and her cheekbones. She had stiffness and soreness in her shoulders and back, had a severe headache, and had red marks on her back. Her recovery progressed slowly, and at the end of July, she consulted John Hannam, an Omaha neurologist.

Hannam took a thorough history of McDonald's symptoms and complaints. He was informed by McDonald that she was in a good state of health prior to the boating accident. Hannam was told by McDonald that another boat rode up over the top of the boat in which she was riding and struck her in the back of the head, that the force of the collision caused her to fall

forward, and that she struck her face against the boat in which she was riding. She complained of severe headaches and pain upon passive flexion of her neck. Based upon his examination, Hannam diagnosed McDonald's condition as posttraumatic headaches. Hannam continued to treat McDonald, and in August 1990, he prescribed physical therapy for McDonald's neck pain because patients with soft-tissue injuries develop muscle spasms.

McDonald again sought medical assistance in August 1992 because of intense pain in her shoulders and neck. After undergoing physical therapy, she visited Hannam in late August, and her condition had improved. Hannam concluded that McDonald suffered from chronic cervical strain, and he testified with a reasonable degree of medical certainty that the cervical strain was permanent and was caused by the accident of July 4, 1989.

John Dobler, McDonald's physical therapist, described the pain McDonald experienced in the back of her neck. Based upon his examination, he testified to a degree of certainty within his profession that sitting and looking down "would tend to aggravate a condition that Julie has." In his opinion, McDonald's physical therapy treatments were medically necessary.

In January 1992, McDonald consulted Thomas Huerter, an orthodontist, complaining of pain in both joints of her jaw and headaches. Upon examination, Huerter noted that McDonald was experiencing pain in both of her temporomandibular joints and had referred neck pain and tightness and that he could feel "popping" in both joint areas. He diagnosed her condition as temporomandibular joint dysfunction syndrome (TMJ).

ANALYSIS

Miller assigns 11 errors. The first five assignments of error concern the court's overruling of objections to testimony by Duane Arp, a conservation officer with the Nebraska Game and Parks Commission. After interviewing Miller, Arp concluded that "she was probably going too slow at the time which would bring the bow of the boat up blocking her vision." Over Miller's objection as to foundation, Arp was allowed to

state his opinion that the driver of a boat has to adjust to bring down the bow of the boat when it is raised up out of the water. Miller contends that there was no foundation laid to establish Arp had any expertise in operating motorboats or knew the responsibilities of the operator of a motorboat and that a lay witness may testify only to facts perceived by his senses and may not give opinions or state conclusions. See *Shamburg v. Folkers*, 187 Neb. 169, 188 N.W.2d 723 (1971).

In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not by judicial discretion, except in those instances under the Nebraska Evidence Rules when judicial discretion is a factor involved in the admissiblity of evidence. *McDermott v. Platte Cty. Ag. Socy.*, 245 Neb. 698, 515 N.W.2d 121 (1994). Miller claims that Arp's testimony imposed upon her a duty to keep the bow of the boat down to control the boat when there was no apparent basis for Arp to know that such duty existed and that allowing Arp's conclusion or opinion into evidence without any foundation was error which requires a new trial on all issues.

Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected. Neb. Rev. Stat. § 27-103(1) (Reissue 1989). As a general rule, to constitute reversible error in a civil case, the admission or exclusion of evidence must unfairly prejudice a substantial right of a litigant complaining about evidence admitted or excluded. *Maresh v. State*, 241 Neb. 496, 489 N.W.2d 298 (1992).

We find that even if there was insufficient foundation for Arp's opinion regarding a duty to keep the bow down to control the boat, the testimony was not prejudicial to Miller. There was sufficient evidence in the record from which a jury could find that the Miller boat struck the Marquardt boat, which was not moving, and from which a jury could properly find that the cause of McDonald's injuries was Miller's failure to maintain a proper lookout and to maintain proper control of the boat regardless of whether the bow of the boat was in the air.

Miller testified that when she first saw the Marquardt boat, she was operating her boat at approximately 30 m.p.h. and the

boat was level in the water. As she came around a curve, the water became choppy, and she slowed down to 15 m.p.h. That speed caused the front end of the boat to rise in the air. Miller said that when the front end of the boat tilts up, she sits on her knees to see over the steering wheel. She explained that a boat is level in the water if it is operating at the proper speed and that if the boat is traveling too slowly, the back of the boat sits deeper in the water, raising the front end of the boat, which is not as heavy.

Miller argues that the court erroneously permitted Arp to state that the Miller boat "came up and over the top" of the Marquardt boat, because there was a dispute as to whether the Miller boat went up onto the Marquardt boat. Previously, Arp stated that he had determined through his investigation that the bottom of the Miller boat struck the upper left-hand side of the Marquardt boat. No objection was made to this statement. Pfeiffer also testified without objection that the Miller boat hit the Marquardt boat, went halfway up onto it, and then slid across the top and back down. Sue Sandberg, a passenger in Miller's boat, stated that the Miller boat slid up onto the Marquardt boat and slid back down after the collision and that the bow of the Miller boat was high in the air prior to the collision. Testimony objected to which is substantially similar to evidence admitted without objection results in no prejudicial error. *Greenwood Ranch v. Morrill Cty. Bd. of Equal.*, 232 Neb. 114, 439 N.W.2d 760 (1989). We find this assignment of error to be without merit.

Miller claims the court erroneously permitted Arp to testify that the Marquardt boat was stationary at the time of the collision. This assignment of error has no merit. Arp testified previously without objection that Miller told him the Marquardt boat was stationary at the time of the collision. Pfeiffer also testified that the Marquardt boat was stationary. Sandberg stated that at the time of the collision, the Marquardt boat was sitting still. The testimony to which Miller objects is substantially similar to evidence which was admitted without objection, and no prejudicial error occurred. See *id.*

Miller next argues that the court erred in overruling her objections to Pfeiffer's testimony that McDonald told him the

Miller boat hit her in the head. McDonald's attorney asked Pfeiffer what McDonald said when he first arrived to help her. We find no error in the admission of the statement by Pfeiffer because the statement was an exception to hearsay under Neb. Rev. Stat. § 27-803(1) (Reissue 1989) as an excited utterance. In addition, the testimony was substantially similar to evidence admitted without objection. See *Greenwood Ranch, supra.* McDonald testified that she turned to jump out of the Marquardt boat or to get away from the Miller boat, but it hit her in the back, slid up on her back, and pushed her head and face down into the boat so that she was clamped down. She testified that her face, neck, shoulders, and the back of her head all hurt immediately after the accident. The court limited the admission of this testimony, even though the limitation was not necessary.

Miller next asserts that it was error for the court to allow Huerter to testify as to the "high and low" of the future cost of treatment for McDonald's condition, because the testimony called for speculation and lacked foundation. Huerter, who had treated McDonald from 1983 to 1987, stated that she returned for treatment on January 29, 1992, reporting headaches, difficulty in chewing, pain in her temporomandibular joints, and referred pain in her neck. McDonald told Huerter that she had been involved in a boating accident in which a boat had come up over the top of the boat in which she was riding and compressed her head and part of her jaw into the railing of the boat. Huerter diagnosed McDonald as having TMJ and testified that it was his opinion, with reasonable medical certainty, that the TMJ was the result of trauma from the accident because the pain began soon after the accident.

Huerter testified that McDonald would need treatment for 12 to 18 months and that if the treatment did not provide relief, surgical intervention could be required. Miller objected to the following question asked of Huerter: "Do you have an opinion as to, say, the high and the low of what the treatment might cost Julie McDonald in the future for this condition?" Huerter stated that the minimum cost based upon the current course of treatment would be $1,200 and that the maximum cost if McDonald needed further tests and diagnosis or fixed

appliances would be $4,000.

The admissibility of expert testimony depends on whether specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. It is for the trial court to make the initial decision on whether the testimony will assist the trier of fact. The soundness of its determination depends upon the qualifications of the witness, the nature of the issue on which the opinion is sought, the foundation laid, and the particular facts of the case. *Nebraska Depository Inst. Guar. Corp. v. Stastny*, 243 Neb. 36, 497 N.W.2d 657 (1993). The testimony was properly admitted. McDonald's future medical expenses were a fact in issue. Huerter taught orthodontics at Creighton University dental school for 4 years. He treated McDonald for 4 years prior to the accident and was familiar with the condition of her teeth prior to the accident. Huerter regularly dealt with TMJ and other types of joint dysfunctions of the jaw. Based upon the foundation presented, the testimony was properly admitted and was not the result of conjecture. The evidence was sufficiently definite to provide a basis for future medical expenses.

Miller next claims the court erred by allowing Dobler, a physical therapist, to give his opinion that McDonald would aggravate her injuries if she sat for an extended period of time. Miller's objections were based on foundation, relevancy, and speculation. She also argued that Dobler was not a proper expert to give such an opinion. We find that the testimony was relevant, proper foundation was given, the testimony was not speculative, and Dobler was a proper expert to give an opinion.

Dobler held a bachelor of science degree in physical therapy and had been a physical therapist for 17 years. He was the director of physical therapy at Midwest Sports and Industrial Rehabilitation (Midwest Rehabilitation) and had treated more than 100 patients with chronic cervical strain.

"If scientific, technical, or other specialized knowledge will assist the trier of fact to . . . determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Neb. Rev. Stat. § 27-702 (Reissue 1989). A trial court's ruling in receiving or excluding an expert's testimony

which is otherwise relevant will be reversed only when there has been an abuse of discretion. *Lantis v. City of Omaha*, 237 Neb. 670, 467 N.W.2d 649 (1991). The trial court did not abuse its discretion in permitting Dobler's testimony.

Miller's next argument is that Dobler was not qualified to testify as to the medical necessity of McDonald's physical therapy. This testimony was similar to the testimony of Hannam. Hannam prescribed the physical therapy and testified that the physical therapy with Midwest Rehabilitation was necessary for McDonald's treatment and care. The admission of the testimony resulted in no prejudicial error. See *Greenwood Ranch v. Morrill Cty. Bd. of Equal.*, 232 Neb. 114, 439 N.W.2d 760 (1989).

Miller next claims that the trial court erred in admitting exhibits 7A through 7K and in instructing the jury on damages based upon admission of these items because no medical provider stated that the charges for the medical services to McDonald were necessary *as a result of the accident*. Exhibit 7A, a summary of medical expenses, was not admitted in evidence. Exhibits 7B through 7K, which are medical bills, were stipulated as being fair and reasonable.

Miller correctly points out that although litigants may stipulate that a plaintiff's medical expenses are fair and reasonable costs or charges, in order to recover the stipulated expenses as damages in a negligence action, the plaintiff must prove that the defendant's conduct was the proximate cause of the medical expenses. See *Renne v. Moser*, 241 Neb. 623, 490 N.W.2d 193 (1992).

In *Renne*, although the parties had stipulated that certain itemized medical expenses were fair and reasonable, there was no evidence that the accident was the proximate cause of the expenses offered in the exhibit. We stated that the stipulated list of expenses was merely a collection of names and numbers without reference to any particular time and, as such, lacked probative value and was irrelevant information which was properly excluded from the jury's consideration.

Therefore, we review the record to determine whether there is sufficient evidence to support the admission of the medical bills. The ultimate determination of whether McDonald's

medical expenses were proximately caused by the injuries she sustained in the boating accident is for the jury.

Exhibit 7B, a $900 bill from Huerter for splint therapy, was properly admitted. Huerter testified that the treatment was medically necessary and that the TMJ was caused by the boating accident.

Exhibit 7C, a statement from Ashland Emergency Service for transportation on July 4, 1989, and exhibit 7D, a statement for emergency room and x-ray services, were properly admitted based on records which show that McDonald was taken by ambulance to the emergency room immediately following the accident.

Exhibit 7E is a bill from Bergan Mercy Medical Center for $205.90. Exhibit 7G is a statement from Midwest Rehabilitation for physical therapy in the amount of $1,036. Exhibit 7I is a statement from Hannam for $766. Exhibit 7J is a $150 statement from Radiology Consultants, P.C., for an MRI (magnetic resonance imaging). Hannam testified that these expenses were medically necessary as part of McDonald's treatment for cervical strain caused by the boating accident. Exhibits 7E, 7G, 7I, and 7J were properly admitted.

Exhibit 7F is a statement for $292 from Immanuel Medical Center for physical therapy treatment in August 1992. The dates of the treatment correspond to an office visit with Hannam, who prescribed the physical therapy. Hannam was continuing to treat McDonald for cervical strain which was caused by the July 1989 boating accident. The evidence was sufficient to establish that the medical expenses described in exhibit 7F were a proximate result of the accident caused by Miller.

Exhibit 7H is a bill for $35 from Physicians Clinic, P.C., for an office visit on July 6, 1989. The record shows that Miller's attorney conceded there was proper foundation for this exhibit.

Exhibit 7K sets forth prescriptions written for McDonald following the boating accident. Two of the prescriptions, amounting to $13.58, lacked adequate foundation. However, Miller has not shown she was prejudiced by the inclusion of these two prescriptions in exhibit 7K or by the admission of exhibit 7K into evidence.

In order to constitute reversible error in a civil case, the admission or exclusion of evidence must unfairly prejudice a substantial right of a litigant complaining about such evidence admitted or excluded. *Maresh v. State*, 241 Neb. 496, 489 N.W.2d 298 (1992). Miller has failed to establish that she was unfairly prejudiced by the receipt into evidence of the medical bills.

There was approximately $4,000 in medical bills which were submitted to the jury for its consideration. The verdict of the jury was general and was in the amount of $73,000. " 'The amount of damages to be awarded is one solely for the fact finder, and its action in this respect will not be disturbed on appeal if it is supported by evidence and bears a reasonable relationship to the elements of the damages proved.' " *Schuessler v. Benchmark Mktg. & Consulting*, 243 Neb. 425, 443, 500 N.W.2d 529, 542 (1993). Accord *Union Ins. Co. v. Bailey*, 234 Neb. 257, 450 N.W.2d 661 (1990). We find that Miller's assignment of error with regard to the admission of exhibits 7B through 7K is without merit.

Miller objected to jury instruction No. 3 on damages. There was sufficient evidence to warrant the giving of the instruction on the value of medical care to date or in the future. In an appeal based on a claim of an erroneous instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *Macholan v. Wynegar*, 245 Neb. 374, 513 N.W.2d 309 (1994); *Kopecky v. National Farms, Inc.*, 244 Neb. 846, 510 N.W.2d 41 (1994). Miller has not met that burden.

Miller's final assignment of error is the trial court's overruling of her motion for new trial. This error was not argued, and it will not be considered. To be considered by an appellate court, an error must be assigned and discussed in the brief of one claiming that prejudicial error has occurred. *Florist Supply of Omaha v. Prochaska*, 244 Neb. 776, 509 N.W.2d 209 (1993).

A jury verdict will not be disturbed on appeal unless it is clearly against the weight and reasonableness of the evidence and is so disproportionate as to indicate that it was the result of

passion, prejudice, mistake, or some means not apparent in the record, or that the jury disregarded evidence or rules of law. *Sanwick v. Jenson*, 244 Neb. 607, 508 N.W.2d 267 (1993).

None of Miller's assignments of error have merit. The evidence shows that McDonald was injured as a result of Miller's negligent operation of the boat which struck McDonald. The damages awarded by the jury were for injuries resulting from the boating accident. We affirm the judgment of the district court.

AFFIRMED.

BOSLAUGH, J., participating on briefs.

MIROSLAV M. HAMERSKY, APPELLANT, V. NICHOLSON SUPPLY CO., APPELLEE.

517 N.W.2d 382

Filed June 10, 1994. No. S-92-1122.

1. **Summary Judgment.** Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.
2. **Termination of Employment.** Unless constitutionally, statutorily, or contractually prohibited, an employer, without incurring liability, may terminate an at-will employee at any time with or without reason.
3. **Employment Contracts.** An employee's at-will status can be modified by contractual terms that may be created by employee handbooks and oral representations.
4. **Employment Contracts: Breach of Contract: Proof.** In an action for breach of a contract of employment, the burden of proving the existence of a contract and all the facts essential to the cause of action is upon the person who asserts the contract.
5. **Employment Contracts.** Oral representations may, standing alone, constitute a promise sufficient to create contractual terms which could modify the at-will status of an employee.
6. _____. An employee's subjective understanding of job security is insufficient to establish an implied contract of employment to that effect.
7. **Summary Judgment: Appeal and Error.** In appellate review of a summary judgment, the court reviews the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all

reasonable inferences deducible from the evidence.

8. **Employment Contracts.** An agreement to give permanent employment simply means to give a steady job of some permanence, as distinguished from a temporary job or temporary employment.
9. **Courts: Ordinances: Judicial Notice: Records: Appeal and Error.** Courts of general jurisdiction will not take judicial notice of municipal ordinances not present in the record, nor will appellate courts on appeal.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed.

Robert F. Bartle, of Healey & Wieland Law Firm, for appellant.

George C. Rozmarin and Mary Kay Frank, of Fraser, Stryker, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellee.

HASTINGS, C.J., WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ.

HASTINGS, C.J.

The plaintiff, Miroslav M. Hamersky, appeals a summary judgment entered in favor of the defendant, Nicholson Supply Co., and against him on his claim for damages for wrongful termination and age discrimination under title 11 of the Lincoln Municipal Code. The plaintiff asserts that the district court erred in (1) failing to find that the defendant's employee handbook, together with the defendant's actions and statements to the plaintiff, constituted an agreement not to discharge him except for good cause; (2) failing to find that the defendant's oral assurances, in conjunction with company practice and policy, created an expectation of permanent employment and constituted a modification of any at-will status of his employment; (3) determining that there was no genuine issue of material fact and that the defendant was entitled to judgment as a matter of law; and (4) failing to find that the actions of the defendant in wrongfully discharging the plaintiff, without notice or due process, constituted age discrimination and a violation of the Lincoln Municipal Code. We transferred this case to our docket as part of our authority to equalize caseloads.

Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Bauers v. City of Lincoln*, 245 Neb. 632, 514 N.W.2d 625 (1994); *Rowe v. Allely*, 244 Neb. 484, 507 N.W.2d 293 (1993).

According to the plaintiff's petition and the affidavits on file, the plaintiff was born on June 30, 1933.

He was employed as a sales representative by the defendant from 1970 until January 22, 1992. From 1970 until 1987, he worked as an "outside" sales representative in a territory in west and central Nebraska. In the spring of 1986, he was advised by company representatives that he would be allowed to move from an outside sales position to an "inside" position, on a salary basis, until his retirement. Also in 1986, because of the retirement of another sales representative, he was asked to move to a different sales territory south of Lincoln. He worked this sales position on a "draw-plus-commission" basis from 1986 until approximately March 1991. At that time, he requested and was allowed to move from the outside sales territory to an inside position. His primary responsibilities were to handle telephone sales, training of other sales representatives, and other office duties. He received a flat hourly wage. Between May and September 1991, he trained three sales representatives. From September 1991 until his discharge in January 1992, he performed office duties and also worked as a sales representative in northeast Lincoln and around Ashland, Nebraska. The plaintiff did not receive additional compensation or commissions for these duties.

On January 15, 1992, the plaintiff was discharged from his employment "without any notification, cause or reason." This action was allegedly in disregard of oral assurances of continued employment, past practices of the company, and implicit assurances given in the company's employment handbook.

The plaintiff first contends that the district court erred in failing to find that the defendant's employee handbook, interpreted with the defendant's actions and statements, constituted an agreement not to discharge him except for good

cause.

We recently stated, in *Hillie v. Mutual of Omaha Ins. Co.*, 245 Neb. 219, 223, 512 N.W.2d 358, 361 (1994), that "[u]nless constitutionally, statutorily, or contractually prohibited, an employer, without incurring liability, may terminate an at-will employee at any time with or without reason."

An employee's at-will status can be modified by contractual terms that may be created by employee handbooks and oral representations. *Hillie v. Mutual of Omaha Ins. Co., supra*; *Hebard v. AT&T*, 228 Neb. 15, 421 N.W.2d 10 (1988).

In *Johnston v. Panhandle Co-op Assn.*, 225 Neb. 732, 738, 408 N.W.2d 261, 266 (1987), we noted:

> [I]f the handbook language constitutes an offer definite in form which is communicated to the offeree, and the offer is accepted and consideration furnished for its enforceability, the handbook provision becomes part of the employment contract. . . . In the case of unilateral contracts for employment, where an at-will employee retains employment with knowledge of new or changed conditions, the new or changed conditions may become a contractual obligation. . . . The employee's retention of employment constitutes acceptance of the offer of a unilateral contract; by continuing to stay on the job, although free to leave, the employee supplies the necessary consideration for the offer.

The plaintiff argues that the defendant's February 2, 1987, handbook, unlike many such handbooks, does not specifically limit the rights of employees; he also refers us to general language regarding loyalty to the company. He further asserts that there is an "implicit assurance" in the section of the handbook which states that " 'employees who quit or are discharged for causes shall not be eligible for any unused paid vacation.' " The plaintiff contends that this reference clearly implies that "employees leave Nicholson Supply only by way [of] quitting or being fired for cause." Brief for appellant at 9. To the contrary, the language means what it says; if an employee quits or is discharged for cause, he or she will not be entitled to unused paid vacation time. If one is terminated for any other reason, that person would be entitled to vacation benefits.

In an action for breach of a contract of employment, the burden of proving the existence of a contract and all the facts essential to the cause of action is upon the person who asserts the contract. *Hillie v. Mutual of Omaha Ins. Co., supra.*

The referenced language in the defendant's employee handbook clearly does not constitute an offer definite in form, and thus, the plaintiff has failed to prove that the handbook supports the formation of a unilateral contract.

The plaintiff next asserts that the district court erred in failing to find that the defendant's oral assurances, in conjunction with its practice and policy, created an expectation of permanent employment and constituted a modification of any at-will status of his employment.

Oral representations may, standing alone, constitute a promise sufficient to create contractual terms which could modify the at-will status of an employee. *Hillie v. Mutual of Omaha Ins. Co., supra*; *Hebard v. AT&T, supra.*

In regard to oral representations, the plaintiff states in paragraph 5 of his affidavit:

> In approximately Spring of 1986, I was advised by company representatives, including Steve Nicholson, an officer and treasurer of Nicholson Supply Company, that I would be allowed to move from an outside sales position to an "inside" position, on a salary basis, until my retirement. In other words, I understood my job would be secure, even if I elected to give up my sales territory and commission income to avoid the strain of travel associated with outside sales.

The defendant properly asserts that an employee's subjective understanding is insufficient to defeat the at-will employment doctrine.

An employee's subjective understanding of job security is insufficient to establish an implied contract of employment to that effect. *Hillie v. Mutual of Omaha Ins. Co., supra*; *Johnston v. Panhandle Co-op Assn., supra.*

It must be conceded from the record that paragraph 5 of the plaintiff's affidavit is the only specific reference to any assurances given to him. However, in an apparent reference to paragraph 5, the plaintiff states in paragraph 3 of his affidavit:

"[A]s I describe more completely below, I was provided oral representations and assurances by company management representatives concerning the nature and permanency of my employment, *unless I was specifically discharged for cause*." (Emphasis supplied.)

Nevertheless, the additional allegations are conclusionary in nature and make no reference to specific facts. We thus are left with a bare statement of "fact" that the plaintiff would be permitted to work inside until his retirement.

In appellate review of a summary judgment, the court reviews the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Bauers v. City of Lincoln*, 245 Neb. 632, 514 N.W.2d 625 (1994); *Rowe v. Allely*, 244 Neb. 484, 507 N.W.2d 293 (1993).

In *Mau v. Omaha Nat. Bank*, 207 Neb. 308, 299 N.W.2d 147 (1980), we rejected an employee's argument that his employment was to last until his retirement at age 65, based on his employer's statements that he was to have a "career" at the bank. The plaintiff attempts to distinguish this case from *Mau* in that here the plaintiff claims to rely on alleged specific assurances of employment until his retirement.

Cited with approval in *Mau* is *Johnson v. National Beef Packing Co.*, 220 Kan. 52, 551 P.2d 779 (1976), in which the employee claimed that the employer's designation of him as a "permanent" employee took him out of the at-will status. The Kansas court said that "an agreement to give permanent employment simply means to give a steady job of some permanence, as distinguished from a temporary job or temporary employment." *Id.* at 55, 551 P.2d at 782.

At another point in his affidavit, the plaintiff states:

> In approximately March, 1991, at a company sales meeting in Omaha, attended by both Jack Nicholson and the sales manager, Steve Aerts, to whom I reported at this time, I requested and was allowed to move from my outside sales territory to a [sic] "inside" position with the company. . . . In agreeing to this new position, Mr. Nicholson not only acknowledged past assurances given

> to me, but also asked me to accept a flat hourly wage, as opposed to prior commissions. I agreed to do this, at a level roughly equivalent to the compensation level I received in 1990.

In his affidavit, Jack Nicholson states:

> To my knowledge, Mr. Hamersky, during his period of employment with Nicholson Supply Company, was never given any written assurances, and no oral statements were made to him by company management or representatives, to the effect that his employment with Nicholson Supply Company was permanent in nature or that he could be discharged only for cause.

In any event, the plaintiff's affidavit lacks specificity in regard to his reliance on "company practice and policy," and the only assurance made was that he "would be allowed to move from an outside sales position to an 'inside' position, on a salary basis, until [his] retirement." This is no more time-specific than having a "career" or "permanent employment." We conclude that the only conclusion properly drawable from the undisputed facts is that the plaintiff's employment was for an indefinite period.

As his final assignment of error, the plaintiff contends that the district court erred in failing to find that the conduct, actions, and decisions of the defendant in wrongfully discharging him, without notice or due process, constituted age discrimination and a violation of title 11 of the Lincoln Municipal Code. The applicable ordinance does not appear in the record. In *Hawkins Constr. Co. v. Director*, 240 Neb. 1, 480 N.W.2d 183 (1992), we reiterated the rule that courts of general jurisdiction will not take judicial notice of municipal ordinances not present in the record, nor will appellate courts on appeal. We further stated:

> Without the benefit of the applicable municipal ordinances involved, neither a district court nor an appellate court is in a position to declare the rights of the parties under the ordinances, any more than a court could declare the rights of parties to a contract without the benefit of the contract.

Id. at 2, 480 N.W.2d at 184.

The plaintiff's assignments of error are without merit. The judgment of the district court is affirmed.

AFFIRMED.

BOSLAUGH, J., participating on briefs.

DONNA MAE GOFF ET AL., APPELLANTS, V. MARY ANN WEEKS, APPELLEE.

517 N.W.2d 387

Filed June 17, 1994. No. S-92-723.

1. **Equity: Appeal and Error.** In an appeal of an equity action, an appellate court reviews the record de novo, subject to the rule that where credible evidence is in conflict on material issues of fact, the appellate court will consider and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.
2. **Actions: Parties: Standing.** In determining if a party is a real party in interest, the focus of the inquiry is whether the party has standing to sue because the party has some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy.
3. _____: _____: _____. The purpose of the inquiry as to whether a party is a real party in interest is to determine whether the party has a legally protectable interest or right in the controversy that would benefit by the relief to be granted.
4. **Contracts: Undue Influence: Proof.** To warrant a rejection of a written instrument on the ground of undue influence, the proponent of undue influence must establish each of the following elements: (1) that the person who executed the challenged instrument was subject to undue influence, (2) that there was an opportunity to exercise undue influence, (3) that there was an intent to exercise undue influence for an improper purpose, and (4) that the result was clearly a product of the undue influence.
5. **Equity: Undue Influence: Proof.** In an equitable action, the proponent of an undue influence theory bears the burden to prove each of the elements by clear and convincing evidence.
6. **Contracts: Undue Influence.** It is not merely the exercise of influence which invalidates a written instrument; rather, it is the exercise of *undue* influence.
7. **Undue Influence: Words and Phrases.** Undue influence is unlawful or fraudulent influence which controls the will of the actor.
8. **Undue Influence: Proof.** Because undue influence is often difficult to prove with direct evidence, it may be reasonably inferred from the facts and circumstances surrounding the actor; his life, character, and mental condition.

However, the party seeking to establish such influence has not met his burden of proof if all the evidence is circumstantial and the inferences to be drawn therefrom are as equally consistent with the hypothesis that undue influence was not exercised as they are with the hypothesis that such influence was exercised.

9. _____: _____. Although the burden of persuasion or the burden of going forward on the issue of undue influence may shift, the ultimate burden of proof remains at all times on the party asserting the issue.
10. **Contracts: Undue Influence: Evidence.** Evidence that the party benefiting by a written document executed made no attempt to keep others from seeing and conversing with the party executing the document tends to show the absence of a disposition to exert undue influence.
11. **Decedents' Estates.** The law recognizes the right of a person to control and dispose of his own property and the right to choose the person who shall be the recipient of his bounty.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Affirmed.

Russell S. Daub, of Daub & Nelson, for appellants.

Neil W. Schilke, of Sidner, Svoboda, Schilke, Thomsen, Holtorf & Boggy, for appellee.

HASTINGS, C.J., WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ.

LANPHIER, J.

Donna Mae Goff, the former wife of Floyd Goff, now deceased, and their three surviving children filed an action in the Dodge County District Court. Donna Goff and the three surviving children sought to prevent life insurance proceeds payable on the death of Floyd Goff from being paid to Mary Ann Weeks, defendant. Floyd Goff had developed a relationship with Weeks after his separation from Donna Goff. Weeks was named as beneficiary on a significant amount of insurance on the life of Floyd Goff. The plaintiffs contend that beneficiary changes to the policies should be voided because Weeks exerted undue influence over the decedent and breached her fiduciary duties by exercising her power of attorney to effectuate these changes, in violation of the express powers granted in the power of attorney. This appeal arises from an order of the Dodge County District Court in favor of Weeks denying the plaintiffs' request for a permanent injunction against Weeks from making any claim on the decedent's

insurance policies and declaring Weeks to be the rightful and legal beneficiary of the decedent's life insurance policies. We affirm the judgment of the district court.

FACTUAL BACKGROUND

Floyd Goff, the decedent, was married to Donna Goff for 33 years before their divorce in February 1988. The marriage produced four children, three of whom survived Floyd Goff. Donna Goff and the three children are the plaintiffs in this action.

In September 1987, Floyd Goff began living with Weeks, the defendant in this case. He was involved in a loving relationship with Weeks and with her children. His relationship with his own three children deteriorated, and there were infrequent communications between the children and him from the time of his divorce from Donna Goff until the time of his death. He was first diagnosed with cancer on June 23, 1991, and was hospitalized for two periods of time; the first from June 29 to August 18, and the second from September 23 to October 18. He died November 1, 1991.

Floyd Goff had six life insurance policies which are the subject of this dispute. Three Prudential policies and a New England Life policy named the Omaha National Bank as beneficiary, as trustee under a revocable trust agreement. The trust agreement originally named Donna Goff as primary beneficiary and his children as secondary beneficiaries. A NACOLAH policy (previously AMOCO) had named both Donna Goff and Weeks as beneficiaries, with 50 percent of the proceeds to each. A Loyalty Life policy had named Donna Goff as the beneficiary. On July 12, during his first hospitalization period, Floyd Goff executed change of beneficiary forms on the Prudential, NACOLAH,and Loyalty Life policies to name Weeks as sole beneficiary to each of these policies. On July 17, he then executed a change of beneficiary form on the New England Life policy, naming Weeks as primary beneficiary and his three children as secondary beneficiaries.

ASSIGNMENTS OF ERROR

We have summarized and reorganized the errors raised by appellants in an effort to present them in an orderly manner.

Appellants contend that the district court erred in not voiding the beneficiary changes because (1) the tape recordings, letters, and statements made by the decedent establish that Weeks exerted undue influence over the decedent; (2) Weeks breached her fiduciary duty pursuant to the power of attorney; (3) Weeks violated the express terms of the power of attorney; and (4) Weeks as attorney in fact made an impermissible gift to herself pursuant to a power of attorney. Appellants also claim that the district court's holding that Donna Goff was not a real party in interest to the Loyalty Life insurance policy of the decedent is in error.

STANDARD OF REVIEW

This is an equitable action commenced in the district court, wherein the plaintiffs sought to enjoin the defendant from making a claim on the decedent's life insurance policies and a declaration of the rightful and legal beneficiaries of the decedent's policies. In an appeal of an equity action, an appellate court reviews the record de novo, subject to the rule that where credible evidence is in conflict on material issues of fact, the appellate court will consider and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another. *Pruss v. Pruss*, 245 Neb. 521, 514 N.W.2d 335 (1994); *State v. Nebraska Assn. of Pub. Employees*, 239 Neb. 653, 477 N.W.2d 577 (1991); *In re Estate of Lienemann*, 222 Neb. 169, 382 N.W.2d 595 (1986).

ANALYSIS

Real Party in Interest

The first issue we address is whether Donna Goff is a real party in interest with respect to the Loyalty Life insurance policy. Upon review of the record, we find that she is. Neb. Rev. Stat. § 25-301 (Reissue 1989) provides that, with an exception not involved here, every "action must be prosecuted in the name of the real party in interest." In determining if a party is a real party in interest, the focus of the inquiry is whether the party has standing to sue because the party has some real interest in the cause of action, or a legal or equitable right, title, or interest in the subject matter of the controversy. The purpose

of the inquiry is to determine whether the party has a legally protectable interest or right in the controversy that would benefit by the relief to be granted. *Nebraska Depository Inst. Guar. Corp. v. Stastny*, 243 Neb. 36, 497 N.W.2d 657 (1993). Exhibit 120 is a letter from Loyalty Life presenting the beneficiary history and a stipulation between the parties confirming such. The history shows Donna Goff to be the named beneficiary prior to the July 12, 1991, change of beneficiaries. If the change of beneficiary to Weeks is voided, Donna Goff would be entitled to the proceeds. Therefore, Donna Goff is a real party in interest.

UNDUE INFLUENCE

The second issue before this court is whether Weeks exerted undue influence over the decedent causing him to change the beneficiaries of his life insurance policies from Donna Goff and her three children to Weeks.

To warrant a rejection of a written instrument on the ground of undue influence, the proponent of undue influence must establish each of the following elements:

> (1) that the person who executed the challenged instrument was subject to undue influence, (2) that there was an opportunity to exercise undue influence, (3) that there was an intent to exercise undue influence for an improper purpose, and (4) that the result was clearly a product of the undue influence.

Pruss v. Pruss, 245 Neb. 521, 536, 514 N.W.2d 335, 346 (1994). Accord, *Miller v. Westwood*, 238 Neb. 896, 472 N.W.2d 903 (1991); *Craig v. Kile*, 213 Neb. 340, 329 N.W.2d 340 (1983); *In re Estate of Saathoff*, 206 Neb. 793, 295 N.W.2d 290 (1980). In an equitable action, the proponent of an undue influence theory bears the burden to prove each of the elements by clear and convincing evidence. *Pruss, supra*. See *In re Estate of Price*, 223 Neb. 12, 388 N.W.2d 72 (1986) (explaining that the burden of proof on a particular issue is controlled by the nature of the cause of action, not by the instrument involved).

It is not merely the exercise of influence which invalidates the written instrument; rather, it is the exercise of *undue* influence. *Pruss, supra*; *In re Estate of Price, supra*. Undue influence is

unlawful or fraudulent influence which controls the will of the actor. *Miller, supra*; *Rule v. Roth*, 199 Neb. 746, 261 N.W.2d 370 (1978).

Because undue influence is often difficult to prove with direct evidence, it may be reasonably inferred from the facts and circumstances surrounding the actor; his life, character, and mental condition. *In re Estate of Villwok*, 226 Neb. 693, 413 N.W.2d 921 (1987). However, the party seeking to establish such influence has not met his burden of proof if all the evidence is circumstantial and the inferences to be drawn therefrom are as equally consistent with the hypothesis that undue influence was not exercised as they are with the hypothesis that such influence was exercised. *In re Estate of Price, supra.*

Although the burden of persuasion or the burden of going forward on the issue of undue influence may shift to the proponent of the instrument, the ultimate burden of proof remains at all times on the party asserting the issue. *Pruss, supra*; *In re Estate of Novak*, 235 Neb. 939, 458 N.W.2d 221 (1990). The party bearing that burden must put forth evidence that convincingly establishes the necessary elements of undue influence. Anything less is not enough to support a finding of undue influence. *Pruss, supra.*

WAS FLOYD GOFF SUBJECT TO UNDUE INFLUENCE?

In the present case, although Floyd Goff was a well-educated man with a long history of employment in the insurance business, we find that with respect to the first element, he was susceptible to undue influence at the time the beneficiary changes were executed. These changes were executed during his first period of hospitalization, when he underwent chemotherapy, blood transfusions, and morphine treatments. He relied upon Weeks for aid with a number of activities while in the hospital, including help with eating, obtaining information, and obtaining the change of beneficiary forms which he requested. He also granted a power of attorney to Weeks. These facts prove that he was susceptible to undue influence.

WAS THERE OPPORTUNITY TO EXERCISE UNDUE INFLUENCE?

The parties do not dispute that Weeks had the opportunity to exercise undue influence over Floyd Goff.

WAS THERE INTENT TO EXERCISE UNDUE INFLUENCE?

Appellants contend Weeks had an intent or disposition to exercise undue influence over Floyd Goff because she was "burned out, embarrassed, and upset about sharing insurance" with Donna Goff and because she did not seek advice for Floyd Goff. Brief for appellants at 45. We do not agree.

Evidence that the party benefiting by the document executed made no attempt to keep others from seeing and conversing with the party tends to show the absence of a disposition to exert undue influence. See *Fremont Nat. Bank & Trust Co. v. Beerbohm*, 223 Neb. 657, 392 N.W.2d 767 (1986). Weeks informed Donna Goff and the children of Floyd Goff's hospitalization and allowed them to visit him alone in the hospital. Weeks called Bill Olson, who was Floyd Goff's friend and manager at Prudential, with a request for him to visit Floyd Goff. Lastly, Weeks obtained the change of beneficiary forms for him and helped fill them out, per his request. In fact, Weeks obtained additional change forms for him *after* she had been named sole beneficiary, again per his request. We find that there is insufficient evidence to prove that Weeks intended to gain an unfair advantage by devices which reasonable persons would regard as improper.

WAS RESULT A PRODUCT OF UNDUE INFLUENCE?

Appellants claim the resulting changes were the product of undue influence because Floyd Goff bestowed upon Weeks a greater amount than he had intended to and effectively disinherited his children. However, the law recognizes the right of a person to control and dispose of his own property and the right to choose the person who shall be the recipient of his bounty. *Eggert v. Schroeder*, 158 Neb. 65, 62 N.W.2d 266 (1954); *Johnson v. Mayfield*, 163 Neb. 872, 81 N.W.2d 308 (1957). The type of undue influence which will void a written instrument is an unlawful or fraudulent influence which controls the will of the actor. *Miller v. Westwood*, 238 Neb. 896, 472 N.W.2d 903 (1991); *Rule v. Roth*, 199 Neb. 746, 261

N.W.2d 370 (1978).

Appellants place a great deal of emphasis upon a tape-recorded conversation between Floyd Goff and appellants, during which Floyd Goff stated, "[T]hey were power of appointing and changing beneficiaries to the point — well, I don't know what the hell was going on, to be honest with you." But just moments prior to issuing this statement, he expressed a large degree of hesitancy to communicate his decision to Donna Goff and the children. This statement was made in the context of a difficult conversation in which a dying man struggled to explain to his former wife of 33 years and his children that they were no longer beneficiaries of his insurance policies. We must weigh that conversation with other evidence in the case.

Appellants also assert Floyd Goff made a statement that he wished Weeks to have between $200,000 and $250,000. Prior to his illness, he had placed assets worth $151,267 in Weeks' name. Appellants contend that the actions of naming Weeks as sole beneficiary to the six policies discussed provide Weeks with proceeds of $347,472; more than the amount intended by him in his statement. Appellants contend that this is in violation of express instructions of the principal. However, at the time Floyd Goff made these monetary range statements, he did not know how much his policies were worth. He then obtained information that the policies were worth more than he had previously believed. He subsequently changed beneficiaries. This did give Weeks a greater amount than indicated in his prior statements; however, the record discloses the lack of consistency is due to his lack of knowledge of the policies' worth at the time of the earlier statements.

Floyd Goff's relationship with Donna Goff and the children had deteriorated since his divorce, and communications between them became infrequent. Conversely, he enjoyed a loving and close relationship with Weeks. They discussed their retirement needs, generally had merged their property, and treated each other as husband and wife. Floyd Goff stated he wished to "provide for" and "take care of" Weeks. The evidence shows that the relationship between him and Weeks was one of affection. It would appear that it was that

relationship which influenced him to make the beneficiary changes. This is no doubt distressing and regretful to his former longtime wife and natural children; however, it is not fraudulent and unlawful.

Appellants thus have not satisfied their ultimate burden to prove by clear and convincing evidence each of the last two elements necessary to establish undue influence.

Appellants' remaining assignments of error are without merit. Appellants contend that in exercising her power of attorney to change the beneficiaries of the six policies, Weeks breached her fiduciary duty to Floyd Goff, violated the express terms of the power of attorney, and as attorney in fact made an impermissible gift to herself pursuant to her power of attorney. Weeks did not exercise her power of attorney to execute the beneficiary changes. While it is true that Weeks helped obtain information and the forms per Floyd Goff's request and that she and her brother helped fill them out per his request, it was Floyd Goff himself who executed the change of beneficiary forms.

CONCLUSION

The district court was correct in declaring Weeks to be the rightful and legal beneficiary of Floyd Goff's life insurance policies. The decision of the district court is affirmed.

AFFIRMED.

BOSLAUGH, J., participating on briefs.

VIRGINIA HORTON, APPELLANT, V. FORD LIFE INSURANCE CO., APPELLEE.

518 N.W.2d 88

Filed June 17, 1994. No. S-92-1106.

1. **Demurrer: Pleadings: Appeal and Error.** When reviewing an order sustaining a demurrer, an appellate court accepts the truth of facts well pled and the factual and legal inferences which may be reasonably deduced from such facts, but does not accept conclusions of the pleader.

2. **Demurrer: Pleadings.** In considering a demurrer, a court cannot assume the existence of a fact not alleged, make factual findings to aid the pleadings, or consider evidence which might be adduced at trial.
3. **Pleadings: Words and Phrases.** A statement of facts sufficient to constitute a cause of action, as used in Neb. Rev. Stat. § 25-806(6) (Reissue 1989), means a narrative of events, acts, and things done or omitted which show a legal liability of the defendant to the plaintiff.
4. **Demurrer: Pleadings.** In ruling on a demurrer, the petition is to be construed liberally; if, as so construed, the petition states a cause of action, the demurrer is to be overruled.
5. **Demurrer: Pleadings: Records.** A demurrer reaches an exhibit filed with the petition and made a part thereof, so that a court can consider such exhibit in determining whether the petition states a cause of action.
6. **Actions: Pleadings: Records.** Exhibits attached to a petition in a case, and being a part of the files therein, which are designated and referred to in an amended petition as exhibits attached thereto, and by reference made a part of the pleading, will be treated as such, in the absence of a motion directed to the same, in determining whether such amended pleading states a cause of action, even though not physically attached to such amended petition.
7. **Subrogation: Pleadings.** Ordinarily, one seeking subrogation must plead it and set forth the facts from which the right of subrogation arises.
8. **Subrogation: Words and Phrases.** Subrogation is the substitution of one person who is not a volunteer, a subrogee, for another, a subrogor, as the result of the subrogee's payment of a debt owed to the subrogor so that the subrogee succeeds to the subrogor's right to recover the amount paid by the subrogee.
9. _____: _____. Generally, subrogation is the right of one, who has paid an obligation which another should have paid, to be indemnified by the other.
10. **Subrogation.** Absent an agreement, the doctrine of subrogation applies only when a party pays the debts of a third person, not as a volunteer, but either out of a legal or moral obligation to do so or to protect his or her own rights or interests or to save his or her own property.
11. **Decedents' Estates: Affidavits.** Anyone paying pursuant to an affidavit prepared under Neb. Rev. Stat. § 30-24,125 (Reissue 1989) is not required to see to the application of the personal property or evidence thereof or to inquire into the truth of any statement in the affidavit.

Appeal from the District Court for Douglas County: PAUL J. HICKMAN, Judge. Reversed and remanded for further proceedings.

Robert J. McCormick, of Anderson, Klein, Peterson & Swan, for appellant.

Michael Heavey, of Dwyer, Pohren, Wood, Heavey, Grimm, Goodall & Lazer, for appellee.

HASTINGS, C.J., WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ.

FAHRNBRUCH, J.

Virginia Horton claims it was error for a district court to sustain a demurrer to her third amended petition and dismiss her lawsuit against Ford Life Insurance Co. (Ford Life) for the proceeds of a credit life insurance policy on the decedent, Roger E. Horton, M.D.

We reverse the ruling of the district court for Douglas County dismissing Horton's cause of action and remand the cause for further proceedings.

FACTS

On April 10, 1992, Horton filed a petition in the trial court seeking a $10,000 judgment against Ford Life, together with interest and attorney fees. In her petition, Horton alleged that (1) Dr. Horton died April 23, 1987, from injuries he sustained when a shotgun accidentally discharged; (2) prior to Dr. Horton's death, Ford Life sold him a disability insurance policy containing life insurance coverage; (3) the policy contained a provision promising to pay Brooks Ford, Inc., a benefit in the amount of $10,000 upon the death of Dr. Horton; (4) the policy was in effect at the time of Dr. Horton's death; (5) immediately after Dr. Horton's death, Brooks Ford submitted a claim to Ford Life "requesting the balance due on the 1986 automobile be paid in full"; (6) the balance due on the automobile at the time of Dr. Horton's death was about $10,000; and (7) Ford Life "refused to pay the balance due on the loan which [Dr. Horton] maintained with Brooks Ford," and as a result, Horton was required to pay the balance due on the loan.

A copy of the insurance policy Dr. Horton purchased from Ford Life was attached to and referred to in Horton's petition. The policy has an effective date of October 7, 1986, a term of 36 months, and is in the original amount of $12,266.40. The policy states: "Claim payments are made to the Creditor to pay off or reduce your debt. If claim payments are more than the balance of your debt, the difference will be paid to you or to a Second Beneficiary or to your estate." The policy does not describe or identify the debt it purports to cover other than to declare that

Brooks Ford is the creditor beneficiary of the policy.

On May 18, Ford Life, claiming that Horton failed to state facts sufficient to constitute a cause of action against Ford Life, demurred to Horton's petition. Following a hearing, the district court sustained Ford Life's demurrer and granted Horton 2 weeks to file an amended petition.

On June 23, Horton filed an amended petition alleging substantially the same facts alleged in her original petition, but adding that because she paid the debt of Dr. Horton, she became subrogated to any claim he might have against Ford Life by virtue of the policy it issued.

On June 29, Ford Life demurred to the amended petition for its failure to state facts sufficient to constitute a cause of action. The district court sustained the demurrer and granted Horton 14 days to file a second amended petition.

In her second amended petition, Horton added that pursuant to Neb. Rev. Stat. §§ 30-24,125 and 30-24,126 (Reissue 1989), she was entitled to bring this lawsuit for and on behalf of Dr. Horton. She further alleged that on November 6, 1989, Horton, then known as Virginia Cookson, signed an "Affidavit for Collection of Personal Property" pursuant to the Nebraska Probate Code.

A conformed copy of that affidavit was attached to and referred to in Horton's second amended petition. The affidavit states that Virginia Cookson is *the* successor of Dr. Horton and that as such, and pursuant to §§ 30-24,125 and 30-24,126, she is entitled to any money due and owing to him, any tangible personal property of his, and all instruments evidencing a debt, obligation, stock, or chose in action belonging to Dr. Horton.

Also attached to the second amended petition was a document entitled "Affidavit for Transfer of Decedent's Motor Vehicle." That "affidavit" states that Virginia Cookson is the surviving spouse of Dr. Horton and that Dr. Horton died seized of a 1986 Ford Tempo. This "affidavit" is not signed by Horton, dated, notarized, or specifically referred to in Horton's second amended petition.

On August 7, Ford Life demurred to Horton's second amended petition. After a hearing at which only Ford Life's counsel appeared, the district court sustained the demurrer and

granted Horton until September 11 to file a third amended petition.

On October 28, Horton filed a motion for leave to file a third amended petition, asserting that her counsel had moved his office prior to receiving Ford Life's demurrer to the second amended petition and that she had not received notice of the hearing on the demurrer until October 20.

On November 5, the district court held a hearing at which (1) the court sustained Horton's motion to file a third amended petition, (2) Horton filed her third amended petition, and (3) Ford Life demurred to the third amended petition.

Horton's third amended petition is identical to her second amended petition, except that she did not attach a copy of the insurance policy to her third amended petition. No copy of the "Affidavit for Transfer of Decedent's Motor Vehicle" was attached to, nor was it referred to in, Horton's third amended petition.

Upon Ford Life's demurrer to Horton's third amended petition, the trial court sustained the demurrer and dismissed Horton's lawsuit.

ASSIGNMENTS OF ERROR

Horton claims that the district court erred in (1) sustaining the demurrer of Ford Life and (2) dismissing her lawsuit.

SCOPE AND STANDARD OF REVIEW

When reviewing an order sustaining a demurrer, an appellate court accepts the truth of facts well pled and the factual and legal inferences which may be reasonably deduced from such facts, but does not accept conclusions of the pleader. See, *Durand v. Western Surety Co.*, 245 Neb. 649, 514 N.W.2d 840 (1994); *Lawyers Title Ins. Corp. v. Hoffman*, 245 Neb. 507, 513 N.W.2d 521 (1994).

In considering a demurrer, a court cannot assume the existence of a fact not alleged, make factual findings to aid the pleadings, or consider evidence which might be adduced at trial. *Id.*

A statement of "facts sufficient to constitute a cause of action," as used in Neb. Rev. Stat. § 25-806(6) (Reissue 1989), means a narrative of events, acts, and things done or omitted

which show a legal liability of the defendant to the plaintiff. *Lawyers Title Ins. Corp., supra*; *Wheeler v. Nebraska State Bar Assn.*, 244 Neb. 786, 508 N.W.2d 917 (1993).

In ruling on a demurrer, the petition is to be construed liberally; if, as so construed, the petition states a cause of action, the demurrer is to be overruled. *Wheeler, supra.*

A demurrer reaches an exhibit filed with the petition and made a part thereof, so that a court can consider such exhibit in determining whether the petition states a cause of action. See, *Braesch v. Union Ins. Co.*, 237 Neb. 44, 464 N.W.2d 769 (1991); *Cagle, Inc. v. Sammons*, 198 Neb. 595, 254 N.W.2d 398 (1977); *Prucha v. Department of Motor Vehicles*, 172 Neb. 415, 110 N.W.2d 75 (1961). Exhibits attached to a petition in a case, and being a part of the files therein, which are designated and referred to in an amended petition as exhibits attached thereto, and by reference made a part of the pleading, will be treated as such, in the absence of a motion directed to the same, in determining whether such amended pleading states a cause of action, even though not physically attached to such amended petition. *Bank of Stockham v. Alter*, 61 Neb. 359, 85 N.W. 300 (1901). Accord *Gilbert Central Corp. v. Overland Nat. Bank*, 232 Neb. 778, 442 N.W.2d 372 (1989). Pursuant to these cases, Dr. Horton's insurance policy will be considered as if it were attached to Horton's third amended petition.

ANALYSIS

Based on the foregoing rules, we review Horton's third amended petition, together with (1) the copy of Dr. Horton's insurance policy, which was attached to Horton's original petition, and (2) the affidavit Horton prepared pursuant to §§ 30-24,125 and 30-24,126, which was attached to and referred to in Horton's third amended petition. After such review, we find that, although perhaps unartfully drafted, Horton's petition nevertheless does state facts sufficient to constitute a cause of action under two theories.

The facts alleged by Horton are sufficient to state a cause of action that she is subrogated to whatever rights Brooks Ford possessed as the creditor beneficiary of the Ford Life insurance policy. The facts alleged by Horton in her third amended

petition are also sufficient to state a cause of action that she is entitled to collect claim payments owed to Dr. Horton's estate pursuant to a specific provision of the policy.

SUBROGATION

Ordinarily, one seeking subrogation must plead it and set forth the facts from which the right of subrogation arises. *Cagle, Inc., supra.* Subrogation is the substitution of one person who is not a volunteer, a subrogee, for another, a subrogor, as the result of the subrogee's payment of a debt owed to the subrogor so that the subrogee succeeds to the subrogor's right to recover the amount paid by the subrogee. *Shelter Ins. Cos. v. Frohlich*, 243 Neb. 111, 498 N.W.2d 74 (1993). Generally, subrogation is the right of one, who has paid an obligation which another should have paid, to be indemnified by the other. *Id.*

Absent an agreement, the doctrine of subrogation applies only when a party pays the debts of a third person, not as a volunteer, but either out of a legal or moral obligation to do so or to protect his or her own rights or interests or to save his or her own property. See, *Chadron Energy Corp. v. First Nat. Bank*, 236 Neb. 173, 459 N.W.2d 718 (1990); *J.J. Schaefer Livestock Hauling v. Gretna St. Bank*, 229 Neb. 580, 428 N.W.2d 185 (1988); *Rawson v. City of Omaha*, 212 Neb. 159, 322 N.W.2d 381 (1982); *Cagle, Inc., supra.*

To state her right of subrogation, Horton must have pled facts sufficient to show the following material elements: (1) Brooks Ford had a right to be paid a benefit from Ford Life under the insurance policy issued by Ford Life to Dr. Horton; (2) Ford Life failed to pay that benefit to Brooks Ford; (3) Horton paid Brooks Ford the amount of the benefit, or in other words, the debt owed by Ford Life to Brooks Ford under the policy; and (4) Horton paid that debt either out of a legal or moral obligation to do so *or* to protect her own rights or interests or to save her own property.

Horton clearly pled facts sufficient to show the first two elements. With regard to the third element, the insurance policy attached to and made part of Horton's petition insures a debt that Dr. Horton owed to the named creditor beneficiary,

Brooks Ford. In her third amended petition, Horton further alleged that she paid the balance due on "*the* loan which [Dr. Horton] maintained with Brooks Ford." (Emphasis supplied.)

It can reasonably be inferred from the alleged facts that Dr. Horton had but one loan with Brooks Ford, that the Ford Life insurance policy covered that loan, and that therefore the debt Horton paid was the same debt insured by Ford Life. The alleged facts in Horton's third amended petition, and the reasonable inferences to be drawn therefrom, are sufficient to show that Horton paid the benefit—or in other words, the debt—owed by Ford Life under the insurance policy involved here.

As to the fourth element necessary to show Horton's right of subrogation, Ford Life argues that Horton failed to state facts sufficient to show she had an interest or property to be protected by having paid the balance due on the loan Dr. Horton maintained with Brooks Ford. Specifically, Ford Life argues that to state her right of subrogation, Horton had to plead that the loan Dr. Horton maintained with Brooks Ford was secured by a lien on a 1986 automobile and that Horton had acquired an interest in that 1986 automobile. Without these allegations, Ford Life argues, Horton failed to show that payment of Dr. Horton's loan would prevent repossession of the automobile and, thereby, protect her interest in the automobile.

This argument is without merit because Horton pled facts sufficient to show that she had an interest *in Dr. Horton's estate*, regardless of whether she had an interest in any particular automobile Dr. Horton may have owned. Attached to and incorporated by reference into Horton's third amended petition was a conformed copy of an "Affidavit for Collection of Personal Property." That document states that Horton, then known as Virginia Cookson, is "*the* successor of Roger E. Horton, deceased." (Emphasis supplied.) Horton also pled that she signed this document pursuant to the Nebraska Probate Code.

The Nebraska Probate Code defines successors as "those persons, other than creditors, who are entitled to property of a decedent under his will or this code." Neb. Rev. Stat.

§ 30-2209(46) (Reissue 1989). Therefore, it can reasonably be inferred from Horton's pleaded facts that Horton, as *the* successor of Dr. Horton, succeeded to the estate of Dr. Horton under his will or the Nebraska Probate Code. It can also be reasonably inferred that by paying off the loan Dr. Horton maintained with Brooks Ford, Horton protected her interest in his estate from the consequences of a default on that loan, including a potential claim against the estate.

HORTON'S ESTATE RIGHTS

Under the heading of "Who Gets Paid," the insurance policy provides that "[i]f claim payments are more than the balance of your debt, the difference will be paid to you or to a Second Beneficiary or *to your [Dr. Horton's] estate.*" (Emphasis supplied.)

In pleading that she paid the balance due on Dr. Horton's loan with Brooks Ford, Horton pled facts showing that the balance of Dr. Horton's debt under the insurance policy was zero at the time she filed this lawsuit. Horton pled further that the amount still owed by Ford Life under the policy was $10,000. Pursuant to the foregoing policy provision, Horton has pled facts showing that as the successor to the estate of Dr. Horton, she has a right to the difference between any claim payments due under the policy at the time of Dr. Horton's death and the balance of Dr. Horton's debt, which she alleged was reduced to zero upon her repayment of Dr. Horton's loan to Brooks Ford. As a matter of law, Ford Life cannot escape paying the benefits due under the policy upon Dr. Horton's death solely because his successor fully paid the debt to Brooks Ford that Ford Life contracted to pay.

In its brief, Ford Life claims that §§ 30-24,125 and 30-24,126 are not applicable because Horton has not shown that Dr. Horton's estate is less than $10,000. In an apparent effort to defeat any interest that Horton has in her claim against Ford Life, Ford Life argues that filings by Horton indicate Dr. Horton's estate is valued in excess of $10,000. Horton's affidavit as successor to Dr. Horton's estate alleges that the "fair market value of the entire estate of the decedent [Dr. Horton], wherever located, *less liens and encumbrances*, does

not exceed ten thousand dollars." (Emphasis supplied.) Section 30-24,126 provides that anyone paying pursuant to an affidavit prepared under § 30-24,125 is "not required to see to the application of the personal property or evidence thereof or to inquire into the truth of any statement in the affidavit." Ford Life, as one allegedly owing a debt to Dr. Horton's estate, upon payment of a debt owed to Dr. Horton's successor, is protected because it is not required to inquire into the truth of the statements in Horton's affidavit.

Furthermore, as stated previously, a court can consider an exhibit attached to and made part of a petition in determining whether the petition states a cause of action. See, *Braesch v. Union Ins. Co.*, 237 Neb. 44, 464 N.W.2d 769 (1991); *Cagle, Inc. v. Sammons*, 198 Neb. 595, 254 N.W.2d 398 (1977); *Prucha v. Department of Motor Vehicles*, 172 Neb. 415, 110 N.W.2d 75 (1961). Whether attached exhibits must meet certain statutory or other legal requirements in order to be used as *proof* of the allegations contained therein is a question we need not consider in reviewing an order sustaining a demurrer.

CONCLUSION

Giving a liberal construction to Horton's third amended petition, together with the exhibits attached to and referred to in Horton's third amended petition and its predecessor petitions, we find that Horton alleged facts sufficient to state a cause of action (1) that she is subrogated to whatever rights Brooks Ford possessed as a creditor beneficiary of the Ford Life insurance policy and (2) that under §§ 30-24,125 and 30-24,126, as the successor of Dr. Horton, she is entitled to collect claim payments owed to Dr. Horton's estate pursuant to a specific provision of the policy.

We reverse the district court's judgment dismissing Horton's cause of action and remand the cause for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

BOSLAUGH, J., participating on briefs.

LARRY R. BOYLES AND OLGA J. BOYLES, APPELLANTS, V. GARY J. HAUSMANN AND RENEE S. HAUSMANN, HUSBAND AND WIFE, ET AL., APPELLEES.

517 N.W.2d 610

Filed June 24, 1994. No. S-92-204.

1. **Declaratory Judgments.** An action for declaratory judgment under the provisions of Neb. Rev. Stat. § 25-21,149 et seq. (Reissue 1989, Cum. Supp. 1992, & Supp. 1993) is sui generis; whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute. The test is whether, in the absence of the prayer for declaratory judgment, the issues presented should properly be disposed of in an equitable as opposed to a legal action.
2. **Restrictive Covenants: Equity.** The action to declare a restrictive covenant invalid and unenforceable is essentially equitable in nature.
3. **Equity: Appeal and Error.** In an equity action, the appellate court reviews the record de novo. In such a review, the appellate court reaches conclusions independent of the factual findings of the trial court, provided, where credible evidence is in conflict, the reviewing court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
4. **Appeal and Error.** As to questions of law, the appellate court is obligated to reach its conclusions independent of the determinations of the trial court.
5. **Declaratory Judgments: Justiciable Issues.** Declaratory judgments are available when a present actual controversy exists and all interested persons are parties to the proceedings, and then only when a justiciable issue exists for resolution. A justiciable issue requires a present, substantial controversy between parties having adverse legal interests susceptible of immediate resolution and capable of present judicial enforcement.
6. _____: _____. A declaratory judgment action cannot be used to determine the legal effects of a set of facts which are future, contingent, or uncertain. At the time that the declaration is sought, there must be an actual justiciable issue from which the court can declare law as it applies to a given set of facts.
7. **Restrictive Covenants: Intent.** Restrictive covenants are to be construed so as to give effect to the intention of the parties at the time they agreed to the covenants.
8. **Restrictive Covenants.** If the language is unambiguous, the covenant shall be enforced according to its plain language, and the covenant shall not be subject to rules of interpretation or construction.
9. **Contracts.** An ambiguity exists when the instrument at issue is susceptible of two or more reasonable but conflicting interpretations or meanings. Moreover, the fact that the parties have suggested opposing meanings of the disputed instrument does not necessarily compel the conclusion that the instrument is ambiguous.
10. **Restrictive Covenants.** When asked to consider a restrictive covenant, a court should keep in mind that restrictive covenants which restrict the use of land are

not favored by the law, and if ambiguous, they should be construed in a manner which allows the maximum unrestricted use of the property. If the language is unambiguous, the covenant should be enforced according to its plain language.

11. _____. If a restrictive covenant agreement also contains a provision which provides for future alteration, the language employed determines the extent of that provision.

12. _____. Under no circumstances shall restrictions on the use of land be extended by mere implication.

Petition for further review from the Nebraska Court of Appeals, CONNOLLY, IRWIN, and WRIGHT, Judges, on appeal thereto from the District Court for Washington County, DARVID D. QUIST, Judge. Judgment of Court of Appeals affirmed as modified.

Nile K. Johnson, of Johnson & Mock, for appellants.

Gregory P. Drew for appellees.

HASTINGS, C.J., WHITE, CAPORALE, FAHRNBRUCH, and LANPHIER, JJ.

WHITE, J.

This appeal arises from an action filed by appellants, Larry R. Boyles and Olga J. Boyles, seeking to declare that a restrictive covenant on their real property is invalid. After a bench trial the district court entered an order declaring the covenants valid. The Nebraska Court of Appeals reversed the decision of the district court. *Boyles v. Hausmann*, 2 Neb. App. 388, 509 N.W.2d 676 (1993). We modify and affirm the decision of the Court of Appeals.

On August 14, 1977, appellants purchased Lot 18 of the Pioneer Hills Subdivision. The Pioneer Hills Subdivision is located at Section 7, Township 17 North, Range 12 East of the 6th P.M. in Washington County, Nebraska. At the time of the purchase, there were covenants on the subdivision lots which restricted the use of the land. These covenants had been established by the original owners of the lots within the subdivision.

Generally, the covenants address the following: (1) limiting residential buildings to one single-family residence per lot; (2) limiting the size and number of attached garages or carports; (3) prohibiting the building of a residence on a plot smaller than the

original lot size; (4) prohibiting noxious or offensive activities; (5) prohibiting trailers, tents, shacks, junk cars, or other temporary structures on a lot; (6) setting minimum size of ground floor living space in residences; (7) restricting the extent of grading the land; (8) restricting type and number of various animals permitted on a lot; (9) limiting the use, size, and number of outbuildings on a lot; (10) prohibiting preconstructed dwellings' being moved to a lot; and (11) requiring preapproval of all construction plans.

The covenants also provided that

> [t]hese covenants, restrictions and conditions shall run with the land and continue until January 1, 1983, after which time they shall be automatically extended for successive periods of five years, unless an instrument signed by a majority of the then owners of said land shall have been recorded in the office of the County Clerk of Washington County, Nebraska, agreeing to change same in whole or in part.

In February 1984, the original covenants were amended by a majority of the lotowners. Appellants voted in favor of these changes. The following covenants were changed at that meeting: (5), permitting recreation vehicles to be parked on lots on which the resident resides; (8), changing the type and number of animals which may be kept on the lots; (9), changing the size of outbuildings permitted on lots of a particular size; (10), excepting new factory-built homes from the prior restriction; and (11), requiring that all building plans be submitted and approved by Pioneer Hills Association officers.

According to the February 1984 amending instrument, the covenants were to

> continue until January 1, 1988, after which time they shall be automatically extended for successive periods of five years, unless an instrument signed by a majority of the then owners of said land shall have been recorded in the office of the County Clerk of Washington County, Nebraska, agreeing to change same in whole or in part.

Amendments were made again in February 1990. Appellants also voted in favor of these amendments. The amendments included the following: (2), changing the restriction on garages

and carports; (6), changing square-foot minimum for residential ground floor space; and (9), changing size limitations on outbuildings. The document also included "Water Use Regulations." These regulations generally involve defining the interests of some lotowners in a jointly owned water system, establishing the fees associated with such interests, providing insurance for the system, regulating the maintenance of the system, and outlining the permissible uses of water from the system.

Finally, the February 1990 instrument provided that

> [t]hese covenants, water use regulations, restrictions and conditions shall run with the land and continue until January 1, 1995, after which time they shall be automatically extended for successive periods of five years, unless an instrument signed by a majority of the then owners of said land shall have been recoded [sic] in the office of the County Clerk of Washington County, Nebraska, agreeing to change same in whole or in part.

On August 24, 1990, a majority of the landowners changed the covenants to include the covenant which is the source of the present dispute. The disputed covenant prohibits the building of residences or other buildings within 120 feet of Pioneer Hills Road (the county road which runs through the subdivision). This covenant was added to an existing covenant, which prohibited residential structures "on any building lot which is smaller in area than the original plotted number on which it is erected." Appellants did not agree to the disputed covenant and did not sign the new instrument.

Appellants filed a declaratory judgment action seeking to have the district court declare the August 1990 covenant invalid. In their petition, appellants contend that as a result of the new covenant, the value of their lot has substantially decreased. Appellants state that because of the size of Lot 18 and an existing pipeline and easement across the lot, the disputed covenant makes the lot unsuitable for building.

After a bench trial, the district court found generally for appellees. Appellants timely filed an appeal to the Court of Appeals.

In the Court of Appeals, appellants argued that the

covenants should be declared invalid because (1) although existing covenants could be changed, new covenants could not be added; (2) appellants detrimentally relied on the fact that when they purchased Lot 18, no setback restriction existed; and (3) the 120-foot setback does not apply uniformly to all of the lots in the subdivision.

The Court of Appeals, finding plain error in the record, examined the February 1990 covenant and found that it did not authorize any changes until after 1995. Accordingly, the Court of Appeals held that the August 1990 covenant was invalid and reversed the decision of the district court. *Boyles v. Hausmann*, 2 Neb. App. 388, 509 N.W.2d 676 (1993). We granted appellees' petition for further review.

An action for declaratory judgment under the provisions of Neb. Rev. Stat. § 25-21,149 et seq. (Reissue 1989, Cum. Supp. 1992, & Supp. 1993) is sui generis; whether such action is to be treated as one at law or one in equity is to be determined by the nature of the dispute. The test is whether, in the absence of the prayer for declaratory judgment, the issues presented should properly be disposed of in an equitable as opposed to a legal action. *Drew v. Walkup*, 240 Neb. 946, 486 N.W.2d 187 (1992). See *Buhrmann v. Buhrmann*, 231 Neb. 831, 438 N.W.2d 481 (1989). In the present case, the action to declare a restrictive covenant invalid and unenforceable is essentially equitable in nature. See, *Northwestern Bell Tel. Co., supra* (stating that an action seeking to declare a statute unconstitutional is an equitable action); *Micek v. Metzger*, 228 Neb. 437, 422 N.W.2d 791 (1988).

In an equity action, the appellate court reviews the record de novo. *Drew, supra.* In such a review, the appellate court reaches conclusions independent of the factual findings of the trial court, provided, where credible evidence is in conflict, the reviewing court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *How v. Mars*, 245 Neb. 420, 513 N.W.2d 511 (1994); *State Bd. of Ag. v. State Racing Comm.*, 239 Neb. 762, 478 N.W.2d 270 (1992); *State ex rel. Spire v. Northwestern Bell Tel. Co.*, 233 Neb. 262, 445 N.W.2d 284 (1989); *Knudtson v. Trainor*, 216 Neb. 653, 345

N.W.2d 4 (1984). As to questions of law, the appellate court is obligated to reach its conclusions independent of the determinations of the trial court. *How, supra*; *Goeke v. National Farms, Inc.*, 245 Neb. 262, 512 N.W.2d 626 (1994); *National Am. Ins. Co. v. Continental Western Ins. Co.*, 243 Neb. 766, 502 N.W.2d 817 (1993); *Drew, supra*; *State Bd. of Ag., supra*; *Northwestern Bell Tel. Co., supra*.

Appellees contend that the Court of Appeals erred in interpreting the covenant agreement and finding that the covenant agreement could not be amended until 1995. Appellees contend that the covenant provision which permits changes is ambiguous and that the action must be remanded for further proceedings in the district court.

Restrictive covenants are to be construed so as to give effect to the intention of the parties at the time they agreed to the covenants. *Breeling v. Churchill*, 228 Neb. 596, 423 N.W.2d 469 (1988); *Micek, supra*. If the language is unambiguous, the covenant shall be enforced according to its plain language, and the covenant shall not be subject to rules of interpretation or construction. *Baltes v. Hodges*, 207 Neb. 740, 301 N.W.2d 92 (1981); *Lakeland Prop. Owners Ass'n v. Larson*, 121 Ill. App. 3d 805, 459 N.E.2d 1164 (1984). See, also, *Knudtson, supra*; *Ross v. Newman*, 206 Neb. 42, 291 N.W.2d 228 (1980). An ambiguity exists when the instrument at issue is susceptible of two or more reasonable but conflicting interpretations or meanings. Moreover, the fact that the parties have suggested opposing meanings of the disputed instrument does not necessarily compel the conclusion that the instrument is ambiguous. *Baker's Supermarkets v. Feldman*, 243 Neb. 684, 502 N.W.2d 428 (1993) (quoting *Crowley v. McCoy*, 234 Neb. 88, 449 N.W.2d 221 (1989)).

The relevant covenant provision provides that

> [t]hese covenants, water use regulations, restrictions and conditions shall run with the land and continue until January 1, 1995, after which time they shall be automatically extended for successive periods of five years, unless an instrument signed by a majority of the then owners of said land shall have been recoded [sic] in the office of the County Clerk of Washington County,

Nebraska, agreeing to change same in whole or in part.

Appellees contend that the word "unless" causes the provision to be susceptible of at least three conflicting meanings. On the contrary, we find that the word "unless" does not render the provision ambiguous. The "unless" clause modifies the immediately preceding clause regarding automatic extension. Thus, the only reasonable reading of the provision is that the term will be automatically extended unless changes are made by a majority.

After thorough review of the decision rendered by the Court of Appeals and our own independent review of the record and the relevant law, we find that the analysis and conclusion of the Court of Appeals are correct with regard to the meaning of the plain language of the covenant agreement. We therefore find it unnecessary to restate the discussion of the Court of Appeals. See *Boyles v. Hausmann*, 2 Neb. App. 388, 509 N.W.2d 676 (1993).

However, we do find it necessary to consider whether the Court of Appeals should have addressed the primary issue raised by appellants: whether a majority of the lotowners may adopt covenants which are new and different from the existing covenants and which are binding on all of the lotowners.

Declaratory judgments are

> available when a present actual controversy exists and all interested persons are parties to the proceedings, and then only when a justiciable issue exists for resolution. . . . A justiciable issue requires a present, substantial controversy between parties having adverse legal interests susceptible to immediate resolution and capable of present judicial enforcement.

Koenig v. Southeast Community College, 231 Neb. 923, 926, 438 N.W.2d 791, 794 (1989). Accord, *Mullendore v. Nuernberger*, 230 Neb. 921, 434 N.W.2d 511 (1989); *Ellis v. County of Scotts Bluff*, 210 Neb. 495, 315 N.W.2d 451 (1982); *Berigan Bros. v. Growers Cattle Credit Corp.*, 182 Neb. 656, 156 N.W.2d 794 (1968). A declaratory judgment action cannot be used to determine the legal effects of a set of facts which are future, contingent, or uncertain. At the time that the declaration is sought, there must be an actual justiciable issue

from which the court can declare law as it applies to a given set of facts. *Mullendore, supra* (quoting *Allstate Ins. Co. v. Novak*, 210 Neb. 184, 313 N.W.2d 636 (1981)); *Ellis, supra*. If, however, an actual dispute as to the parties' legal rights is demonstrated, a violation of those rights is not a condition precedent to the availability of declaratory relief. See, *Hickory Point v. Anne Arundel County*, 316 Md. 118, 557 A.2d 626 (1989); *Neidhart v. Areaco Investment Company*, 514 S.W.2d 831 (Mo. App. 1974).

As discussed above, the Court of Appeals correctly concluded that the covenant agreement did not authorize amendments until after January 1, 1995. Nevertheless, we find that the issue regarding whether a majority of the lotowners may adopt a new covenant presents an actual controversy between the parties, for which the requested relief will provide a remedy. The record in the district court and the Court of Appeals demonstrates that the likelihood that appellees will attempt to adopt a similar covenant on or after January 1, 1995, is both imminent and certain. Additionally, the record reflects that the disputed covenant has adversely affected appellants' recent attempts to sell Lot 18. In the context of the instant case, this issue is specifically defined, the affected parties are identified and are parties to the proceeding, and the issue is capable of judicial resolution. We therefore find that it is appropriate for this court to address whether, pursuant to the covenant agreement, a majority of the lotowners may adopt new covenants which restrict the use of all lots within the subdivision. See *How v. Baker*, 223 Neb. 100, 388 N.W.2d 462 (1986) (considering whether plaintiffs were entitled to declaratory judgment regarding proposed future amendments to existing restrictive covenants).

Restrictive covenants are to be construed in connection with the surrounding circumstances at the time that the covenants were made to give effect to the intention of the parties. *Breeling v. Churchill*, 228 Neb. 596, 423 N.W.2d 469 (1988); *Micek v. Metzger*, 228 Neb. 437, 422 N.W.2d 791 (1988); *Baltes v. Hodges*, 207 Neb. 740, 301 N.W.2d 92 (1981); *Hogue v. Dreeszen*, 161 Neb. 268, 73 N.W.2d 159 (1955); *Caughlin Homeowners Ass'n v. Caughlin Club*, 849 P.2d 310 (Nev.

1993); *Lakeland Prop. Owners Ass'n v. Larson*, 121 Ill. App. 3d 805, 459 N.E.2d 1164 (1984); *Van Deusen v. Bussmann*, 343 Mo. 1096, 125 S.W.2d 1 (1939). When asked to consider a restrictive covenant, a court should keep in mind that restrictive "covenants which restrict the use of land are not favored by the law, and, if ambiguous, they should be construed in a manner which allows the maximum unrestricted use of the property." *Knudtson v. Trainor*, 216 Neb. 653, 655, 345 N.W.2d 4, 6 (1984). Accord, *Ross v. Newman*, 206 Neb. 42, 291 N.W.2d 228 (1980); *Egan v. Catholic Bishop*, 219 Neb. 365, 363 N.W.2d 380 (1985); *Larson, supra*. If the language is unambiguous, the covenant should be enforced according to its plain language. *Larson, supra*. See, also, *Knudtson, supra*; *Ross, supra*. If a restrictive covenant agreement also contains a provision which provides for future alteration, the language employed determines the extent of that provision. *Larson, supra*. Further, under no circumstances shall restrictions on the use of land be extended by mere implication. *Van Deusen, supra*.

In the instant case, the provision of the covenant agreement which authorizes changes provides that

> [*t*]*hese covenants*, water use regulations, restrictions and conditions shall run with the land and continue until January 1, 1995, after which time *they* shall be automatically extended for successive periods of five years, unless an instrument signed by a majority of the then owners of said land shall have been recoded [sic] in the office of the County Clerk of Washington County, Nebraska, agreeing *to change same* in whole or in part.

(Emphasis supplied.)

In light of the principles set forth above, we find that the unambiguous language of this provision authorizes a majority of the lotowners to make changes to existing covenants, but the provision does not authorize a majority to add new and different covenants. In the covenant agreement, the change provision follows the itemization of the land-use covenants, and the provision refers to "these covenants" and provides that "they" shall be automatically extended, unless the majority changes the "same." The references throughout this provision refer only to the previously listed covenants. We find that there

is no other reasonable reading of this provision and that the provision does not authorize a majority of lotowners to bind all lotowners to new and different covenants which restrict the use of land. See, *Larson, supra* (discussing a provision nearly identical to that presented in this case); *Caughlin Homeowners Ass'n, supra* (adopting the rationale of *Larson*).

Appellees rely on a decision by this court in *How v. Baker, supra*, and argue that amendments which are made to existing covenants pursuant to authority granted in the original covenant agreement are enforceable. Although the *How* case is factually similar to the case at bar, the court in *How* did not address the issue with which we are presented in this case.

In *How*, the plaintiffs had filed a declaratory judgment action, seeking a declaration that a proposed amendment to the original covenants was invalid. The issues raised by the plaintiff involved an amendment regarding assessments on the real estate located in the subdivision. The first issue considered on appeal was whether the original covenants ran with the land and whether plaintiffs had adequate notice of such covenants. The second issue was whether the board of directors of the homeowners' association, acting on behalf of the association, was authorized to make amendments to the original covenants. The court did not consider whether the proposed amendment was a change of an existing covenant, or whether the association had the authority to adopt new and different covenants without the unanimous consent of the lotowners.

The statement of facts provided in the *How* opinion does not indicate that the proposed amendment at issue was a new and different covenant. It is true that courts shall enforce changes to original covenants when such changes are permitted by the covenant agreement. We emphasize, however, that such changes may not exceed the scope and extent of that authority to make changes as set forth in the covenant agreement. We find that our decision in the instant case is not inconsistent with the *How* decision, nor is our decision controlled by *How*.

The issue then becomes whether the disputed covenant constitutes a new and different covenant when compared with the existing covenants.

The disputed covenant provides that no building may be

erected within 120 feet of Pioneer Hills Road. This covenant was added to an existing covenant, which prohibited residential structures from being built "on any building lot which is smaller in area than the original plotted number on which it is erected." The existing covenant to which the disputed covenant was added did not address where on the lot a building could be erected or how far from the lot boundaries a building could stand. We find that compared with this existing covenant, the disputed covenant is new and different.

Similarly, the disputed covenant is new and different from the other covenants which existed when the disputed covenant was adopted. The other covenants involved the size of a residence and the size of its floor plan, limited the size of garages, prohibited nuisances, prohibited temporary shelters, restricted the type and number of animals, limited the number of outbuildings, and required preapproval of construction plans. We find that none of these existing covenants involved setbacks, nor did such covenants restrict in any way the location of a building on a lot.

The law will not subject a minority of landowners to unlimited and unexpected restrictions on the use of their land merely because the covenant agreement permitted a majority to make changes to existing covenants. Although we will enforce those restrictions of which a landowner has notice, we will not hold that a property owner is bound to that of which he does not have notice. There is nothing in the existing covenants which would have put appellants on notice that their land would one day be subject to a setback limit. See, *Egan v. Catholic Bishop*, 219 Neb. 365, 363 N.W.2d 380 (1985) (holding that a landowner may not later seek to enforce a restrictive covenant, if prior to purchase he knew of a continuing violation of the covenant); *Caughlin Homeowners Ass'n v. Caughlin Club*, 849 P.2d 310 (Nev. 1993) (stating that there was nothing in the existing covenant agreement which alerted plaintiff that the defendant could change the covenants to include assessment fees against plaintiff); *Lakeland Prop. Owners Ass'n v. Larson*, 121 Ill. App. 3d 805, 459 N.E.2d 1164 (1984) (stating that courts should not enforce covenant changes of which the owner did not have reasonable notice at the time he acquired the

land).

Finally, we address appellees' estoppel argument. Appellees appear to offer two different theories that appellants are estopped from challenging the disputed covenant. First, appellees argue that appellants, by their previous actions, are estopped from challenging the validity of the "covenant which provides for amendment by majority action." Brief for appellees at 3. Broadly accepting appellees' estoppel argument, we find that its premise is flawed. Appellants do not challenge the validity of the covenant provision which permitted changes; rather, appellants challenge the extent of the changes permitted pursuant to that provision. As stated above, we acknowledge the validity of a provision which permits change; however, we hold that the disputed covenant exceeded the extent and scope of the changes permitted by the covenant agreement.

Second, appellees contend that appellants accepted the 1984 and 1990 changes to the original covenant agreement, and thus, appellants waived their right to challenge the validity of the disputed covenant. This theory is similarly flawed. Unlike the disputed covenant, the prior changes did not constitute new and different covenants. The changes made by a majority of the lotowners in 1984 and 1990 were changes made to existing covenants, not the addition of new covenants restricting the use of the land.

In summary, we find that (1) the provision of the February 1990 covenant agreement did not authorize changes by a majority of the lotowners until after January 1, 1995; (2) although a majority could adopt changes to the original covenants, a majority did not have the authority to adopt new and different covenants which restricted the use of the land; and (3) appellants were not estopped from asserting their right to challenge the validity of the disputed covenant.

We therefore affirm, as modified herein, the decision of the Court of Appeals reversing the decision of the district court.

AFFIRMED AS MODIFIED.

BOSLAUGH, J., participating on briefs.

WRIGHT, J., not participating.

IRIS A. SMITH, APPELLANT, V. RICHARD D. SMITH, APPELLEE, AND NORWEST BANK NEBRASKA, N.A., BOTH FOR ITSELF AND AS TRUSTEE OF THE VERN W. SMITH FAMILY TRUST AND AS TRUSTEE OF THE OPAL L. SMITH FAMILY TRUST, GARNISHEE-APPELLEE.

517 N.W.2d 394

Filed June 24, 1994. Nos. S-92-797, S-92-798.

1. **Trusts.** Interpretation of the language of a trust is a matter of law.
2. **Appeal and Error.** Regarding matters of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review.
3. **Trusts: Intent.** The primary rule of the construction of trusts is that a court must, if possible, ascertain the intention of the testator or creator.
4. _____: _____. In interpreting a trust, the entire instrument, all its parts, and its general purpose and scope are to be considered; no parts are to be disregarded as meaningless if any meaning can be given them consistent with the rest of the instrument.
5. **Trusts: Debtors and Creditors.** Generally, support trusts may be reached by creditors for support-related debts, but discretionary trusts may not be reached by creditors for any reason.
6. **Judgments: Debtors and Creditors: Garnishment.** A judgment creditor has no greater right against a garnishee than that possessed by a judgment debtor.
7. **Trusts.** The trustee of a discretionary support trust can be compelled to carry out the purposes of the trust in good faith.
8. _____. Ordinarily, the trustee of a discretionary support trust should consider factors such as the degree of need experienced by the beneficiaries, the standard of living experienced by the beneficiaries at the time the trust was created, and the financial relations between the settlor and the beneficiaries prior to the formation of the trust.
9. **Res Judicata: Judgments.** The doctrine of res judicata bars the relitigation of a matter that has been directly addressed or necessarily included in a former adjudication if (1) the former judgment was rendered by a court of competent jurisdiction, (2) the former judgment was a final judgment, (3) the former judgment was on the merits, and (4) the same parties or their privies were involved in both actions.
10. **Final Orders: Words and Phrases.** A ruling is final when no further action of the court is required to dispose of the cause pending.
11. **Motions for New Trial: Appeal and Error.** A trial court must rule on a motion for new trial before an appeal can be perfected.
12. **Summary Judgment.** Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue of material fact or as to the ultimate inferences to be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
13. **Summary Judgment: Appeal and Error.** On appellate review of a summary

judgment, the court views the evidence in a light most favorable to the party against whom judgment was granted and gives such party the benefit of all reasonable inferences deducible from the evidence.

Appeal from the District Court for Douglas County: THEODORE L. CARLSON, Judge. Judgment in No. S-92-798 affirmed as modified. Judgment in No. S-92-797 reversed and remanded for further proceedings.

Neil W. Schilke and Bradley E. Nick, of Sidner, Svoboda, Schilke, Thomsen, Holtorf & Boggy, for appellant.

Keith Miller and Martin P. Pelster, of Croker, Huck, Kasher, DeWitt, Anderson & Gonderinger, P.C., for garnishee-appellee.

HASTINGS, C.J., WHITE, CAPORALE, FAHRNBRUCH, and WRIGHT, JJ.

PER CURIAM.

This opinion involves two appeals which arise from consecutive cases regarding the same matter.

In case No. S-92-798, the initial action, the plaintiff, Iris A. Smith, appeals from an order of the district court for Douglas County which held that the assets of two trusts held in favor of her former husband, Richard D. Smith, were not available for garnishment for the purpose of paying the former husband's child support arrearage. The plaintiff claims that under the terms of the trusts and applicable precedent, the trusts may be reached for the purpose of paying a support obligation.

In case No. S-92-797, the subsequent action, the plaintiff appeals from the order of the district court for Douglas County which granted the motion of the trustee, Norwest Bank Nebraska, N.A. (Norwest), to quash her application.

APPLICATION TO DETERMINE LIABILITY OF GARNISHEE

In consideration of the motion, the trial court found that "the legal questions proffered by the parties [were] basically the same as [had been] decided by the court" in the initial action.

Richard and Iris Smith were married in 1956 and divorced in 1965. The marriage produced three children. The divorce

decree granted custody of the children to Iris and ordered Richard to pay child support in the amount of $40 a week. Richard has never made any payments. The total amount due, with interest, is more than $90,000.

The trusts in issue were established by Richard's parents, Opal L. and Vern W. Smith. The provisions of the trusts which pertain to this case are nearly identical. The trust created by Vern states:

> (a) Until the death of my son Richard the Trustee shall pay over to, or for the benefit of, any one or more of the living members of a class composed of my son Richard and his issue, so much of the net income and principal of the trust as the Trustee shall deem to be in the best interests of each such person, from time to time. Such distributions need not be made equally unto all members of the class. In determining the amount and frequency of such distributions, the Trustee shall consider that:
>
> (1) The primary purpose of the trust is to provide for the health, support, care and maintenance of my son Richard during his lifetime.
>
> (2) The secondary purpose of the trust is to provide for the health, support, care, comfort and education of the issue of my son Richard in the event the parents of any such issue are unable to provide the same [hereinafter referred to as the support provision].

The trusts also provide that the corpus of each trust in existence at the time of Richard's death should be distributed to his issue then living.

Another provision of the trusts grants power to the trustee. In Vern's trust, this provision states, in pertinent part:

> The Trustee shall have full, absolute and uncontrolled discretionary power and authority to exercise or fail to exercise any and all of the powers, rights and authorities provided under this Declaration of Trust without license, leave or order of any court. All decisions made in good faith pursuant to discretionary powers and authorities herein conferred upon the Trustee shall be final and conclusive upon all beneficiaries hereunder [hereinafter referred to as the discretionary provision].

The plaintiff filed the initial action on May 28, 1991, in an attempt to garnish assets in the possession of Norwest. During the course of the action, the garnishee, Norwest, indicated in interrogatories that it was indebted to Richard in the amount of $1,721.83. Norwest did not report that it was the trustee for the Smith trusts held for the benefit of Richard. On June 24, the trial court entered an order directing Norwest to pay funds into the court which were applied to the arrearage. Norwest complied with the order. On that same day, the plaintiff filed an application to determine the liability of the garnishee with respect to the trusts.

The trial court held a hearing on the application on August 7, 1991. The trial court found that the trusts were discretionary trusts, rather than support trusts, and, as such, beyond the reach of creditors. The trial court dismissed the initial action, and the plaintiff filed a motion for a rehearing or for a new trial.

During the time that the trial court was considering the motion in the initial action, Richard was held in contempt of the district court for Dodge County for failure to heed the divorce decree. The contempt order allowed Richard to purge himself of contempt by paying the arrearage or by demanding that the trustee pay the arrearage with trust assets. Shortly thereafter, Richard explained to Norwest that the contempt charge was having detrimental effects on his health and requested Norwest to pay the arrearage. Norwest refused.

The plaintiff then filed the subsequent garnishment action against Norwest and, in conjunction with that action, filed a second application to determine the liability of the garnishee with respect to the trusts. Norwest filed a motion to quash the application. The trial court granted the motion to quash, and the plaintiff filed a motion for a rehearing. The court denied the motions for rehearing of both garnishment actions in August 1992, and these appeals followed.

APPEAL FROM INITIAL GARNISHMENT ACTION, NO. S-92-798

In the initial action, the plaintiff asserts that the trial court erred (1) in holding that the trusts were not subject to

garnishment for the payment of Richard's child support obligation, (2) in finding that the trusts were discretionary trusts, (3) in dismissing the garnishment action, and (4) in overruling the motions for a new trial or a rehearing.

The facts are not in dispute in this case. The trial court based its holding solely on the legal conclusion that the trusts were discretionary trusts. Interpretation of the language of a trust is a matter of law. *Burch v. George*, 7 Cal. 4th 246, 866 P.2d 92, 27 Cal. Rptr. 2d 165 (1994). Regarding matters of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review. *Sherard v. State*, 244 Neb. 743, 509 N.W.2d 194 (1993).

The primary rule of the construction of trusts is that a court must, if possible, ascertain the intention of the testator or creator. *Karpf v. Karpf*, 240 Neb. 302, 481 N.W.2d 891 (1992). It is also the rule that in interpreting a trust, the entire instrument, all its parts, and its general purpose and scope are to be considered; no parts are to be disregarded as meaningless if any meaning can be given them consistent with the rest of the instrument. *Id.*

The Smith trusts contain provisions which are in conflict under the facts of the case. The discretionary provision allows the trustee essentially unlimited freedom in controlling trust assets; the support provision limits the trustee's power to apply trust assets. Generally, courts have held that support trusts may be reached by creditors for support-related debts, but that discretionary trusts may not be reached by creditors for any reason. Evelyn G. Abravanel, *Discretionary Support Trusts*, 68 Iowa L. Rev. 273 (1983).

Norwest promotes the interpretation of the trusts that was adopted by the trial court, which interpretation gives effect to the discretionary provisions of the trusts and nullifies the support provisions of the trusts. Norwest argues that a judgment creditor has no greater right against a garnishee than that possessed by a judgment debtor. See *Action Heating & Air Cond. v. Petersen*, 229 Neb. 796, 429 N.W.2d 1 (1988). Norwest claims that Richard cannot compel Norwest to make payments from the trusts and, as a creditor, neither can the plaintiff. Conversely, the plaintiff would interpret the trusts such that the

support provisions would be given effect and the discretionary provisions would be inoperative. Neither of these interpretations is correct. The trusts should not be construed as either type of trust but as a hybrid of the two types of trusts: a discretionary support trust. See, *Lang v. Com., Dept. of Public Welfare*, 515 Pa. 428, 528 A.2d 1335 (1987); Abravanel, *supra*.

This court interpreted a discretionary support trust in *In re Will of Sullivan*, 144 Neb. 36, 12 N.W.2d 148 (1943). In *In re Will of Sullivan*, the wife of a beneficiary of a trust filed suit against the trustee to obtain the proceeds of the trust. The trial court determined that the wife could compel the trustee to make support payments of $50 per month to her. On appeal, this court stated that the wife was in need and entitled to support payments, but that the court could not determine the amount of those payments. The court stated that the discretionary language served to dispose of the reasonableness standard to which support trustees were held. The cause was remanded with directions that the trial court order the trustee to make payments in accord with the language of the trust.

We find that *In re Will of Sullivan* does not stand for the proposition that in all cases the dependents of a beneficiary of a discretionary support trust can compel a trustee to make payments for their benefit. We interpret the case to mean that the trustee of a discretionary support trust can be compelled to carry out the purposes of the trust in good faith.

As indicated by the language of the trusts, the settlors' purpose in creating the trusts was not only to support the beneficiaries of the trusts, Richard and his issue, but also to grant the trustee greater liberty in decisionmaking than the trustee of an ordinary support trust. These purposes must be served by Norwest as the trustee of the Smith trusts. In *In re Will of Sullivan, supra*, we stated:

> "The settlor may, however, manifest an intention that the trustee's judgment need not be exercised reasonably . . . . [Words which purport to give trustees unlimited discretion] are not interpreted literally but are ordinarily construed as merely dispensing with the standard of reasonableness. . . . Thus, the trustee will not be permitted to act dishonestly, or from some motive other than the

> accomplishment of the purposes of the trust, or ordinarily to act arbitrarily without an exercise of his judgment."

144 Neb. at 39-40, 12 N.W.2d at 150. Accord Restatement (Second) of Trusts § 187, comment *j*. (1959).

Ordinarily, the trustee of a discretionary support trust should consider factors such as the degree of need experienced by the beneficiaries, the standard of living experienced by the beneficiaries at the time the trust was created, and the financial relations between the settlor and the beneficiaries prior to the formation of the trust. Abravanel, *supra*. In this case, however, the payment of the child support arrearage would not further the purposes of the trusts, since the children are emancipated. Without a showing that the payment of the arrearage would contribute to the support of the beneficiaries of the trusts, Norwest could not be compelled to distribute trust assets.

The trial court correctly ruled that the plaintiff was not entitled to payment of Richard's child support arrearage from the Smith trusts. The trial court incorrectly ruled that the trusts were discretionary trusts and beyond the reach of creditors and beneficiaries alike. We direct that the judgment of the trial court be modified to reflect the reasoning of this opinion, and we affirm the judgment as so modified.

APPEAL FROM SECOND GARNISHMENT PROCEEDING, NO. S-92-797

The parties agreed at oral argument that the appeal from the ruling in the subsequent action was of no effect if the ruling in the initial action was affirmed as written. Given our modification of that ruling such that the trusts are no longer considered pure discretionary trusts, we will address the issues raised in this appeal.

The plaintiff asserts that the trial court erred in granting the motion to quash. The trial court order does not specify the reason for the granting of the motion, but, given its language, the order could have been based on the principles of either res judicata or summary judgment. We will analyze both theories.

The doctrine of res judicata bars the relitigation of a matter that has been directly addressed or necessarily included in a former adjudication if (1) the former judgment was rendered

by a court of competent jurisdiction, (2) the former judgment was a final judgment, (3) the former judgment was on the merits, and (4) the same parties or their privies were involved in both actions. *DeVaux v. DeVaux*, 245 Neb. 611, 514 N.W.2d 640 (1994); *Kerndt v. Ronan*, 236 Neb. 26, 458 N.W.2d 466 (1990). To analyze Norwest's res judicata defense, we must determine whether a judgment is final when a motion for a rehearing of the matter is under consideration.

The ruling of the trial court in the initial action was not a final decision for the purposes of appeal as defined by Neb. Rev. Stat. § 25-1902 (Reissue 1989). A ruling is final when no further action of the court is required to dispose of the cause pending. *Lake v. Piper, Jaffray & Hopwood, Inc.*, 212 Neb. 570, 324 N.W.2d 660 (1982). A trial court must rule on a motion for a new trial before an appeal can be perfected. *Harkness v. Central Nebraska Public Power & Irrigation Dist.*, 154 Neb. 463, 48 N.W.2d 385 (1951). Because the initial action was not final for the purposes of appeal, we hold that the trial court was incorrect if it quashed the subsequent action as barred by res judicata.

This court has addressed an analogous procedural situation. In *Fassler v. Streit*, 92 Neb. 786, 139 N.W. 628 (1913), the court held that a supersedeas bond and an appeal from a trial court ruling rendered the ruling inadmissible as evidence of a final adjudication. In the present case, the plaintiff could not file either an appeal or a supersedeas bond prior to the commencement of the subsequent action due to the motion which was under consideration. Norwest might properly have disposed of the action by filing a plea in abatement, but since no plea was filed, we need not address its merits.

Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue of material fact or as to the ultimate inferences to be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Dahlke v. John F. Zimmer Ins. Agency*, 245 Neb. 800, 515 N.W.2d 767 (1994); *Dalton Buick v. Universal Underwriters Ins. Co.*, 245 Neb. 282, 512 N.W.2d 633 (1994). On appellate review of a summary judgment, the court views the evidence in

a light most favorable to the party against whom judgment was granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Dahlke, supra*; *Rowe v. Allely*, 244 Neb. 484, 507 N.W.2d 293 (1993).

The plaintiff asserts that material issues of fact exist regarding Norwest's duty to make a distribution of the trust assets. The plaintiff claims that under the facts detailed in the hearing to determine Norwest's liability, the trier of fact could compel Norwest to pay trust assets under the terms of the trusts. We acknowledge that the possibility exists in this case. At the hearing, the plaintiff introduced evidence of Richard's written request that the arrearage be paid by the trusts. The plaintiff also introduced uncontroverted expert testimony that the stress stemming from the contempt charge was detrimental to Richard's health. As trustee, Norwest should not be allowed to dismiss the expert testimony without examination. Norwest should consider the terms of the trusts and the circumstances of the beneficiaries. Norwest should then make a good faith determination regarding payment of the arrearage.

Accordingly, the judgment of the district court in granting the motion to quash is reversed, and the cause is remanded for further proceedings consistent with this opinion.

JUDGMENT IN NO. S-92-798 AFFIRMED AS MODIFIED.

JUDGMENT IN NO. S-92-797 REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

BOSLAUGH, J., participating on briefs.

LANPHIER, J., not participating.

CHRISTINE L. HITZEMANN, APPELLANT, V. GEORGE M. ADAM, M.D., AND MARY LANNING MEMORIAL HOSPITAL, APPELLEES.

518 N.W.2d 102

Filed June 24, 1994. No. S-92-1013.

1. **Demurrer: Pleadings: Appeal and Error.** When reviewing a ruling on a general demurrer, an appellate court is required to accept as true all facts which are well

pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the conclusions of the pleader.

2. **Actions: Malpractice.** A cause of action arising while a patient and health care provider are subject to the Nebraska Hospital-Medical Liability Act is to be adjudicated in accordance with the provisions of the act.
3. **Demurrer: Pleadings.** When a demurrer to a petition is sustained, the trial court must grant the plaintiff leave to amend the petition unless it is clear that no reasonable possibility exists that by repleading the plaintiff will be able to correct the defective petition. After the demurrer has been sustained, but where there is a reasonable possibility that the defective petition may be cured by amendment, denying the plaintiff the opportunity to replead is an abuse of discretion.
4. **Malpractice: Physicians and Surgeons: Parent and Child: Damages.** Parents of a healthy, normal child born after an unsuccessful sterilization operation may not recover child-rearing costs, but may recover damages for such child for prenatal and delivery medical expenses; for emotional distress, loss of wages, pain and suffering, and loss of consortium caused by the failed sterilization, pregnancy, and childbirth; and for any costs associated with a second corrective sterilization procedure.
5. **Malpractice: Damages: Proof.** Because of the speculative nature of the damages, the cost of rearing a healthy, normal child born as the result of medical malpractice cannot be recovered. However, damages for such child for prenatal and delivery medical expenses; for emotional distress, loss of wages, pain and suffering, and loss of consortium caused by the failed sterilization, pregnancy, and childbirth; and for any costs associated with a second corrective sterilization procedure if proven, may be recovered.

Appeal from the District Court for Adams County: BERNARD SPRAGUE, Judge. Reversed and remanded for further proceedings.

Daniel J. Thayer, of Lauritsen, Brownell, Brostrom & Stehlik, for appellant.

Mark E. Novotny, of Kennedy, Holland, DeLacy & Svoboda, for appellee Adam.

Robert W. Wagoner for appellee Mary Lanning Memorial Hospital.

HASTINGS, C.J., WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ.

PER CURIAM.

The plaintiff, Christine L. Hitzemann, filed this action against the defendants, George M. Adam, M.D., and Mary Lanning Memorial Hospital (Hospital), for medical malpractice under the Nebraska Hospital-Medical Liability Act

and for breach of contract. The trial court sustained the defendants' demurrers to the plaintiff's second amended petition and dismissed the plaintiff's cause of action without prejudice. The plaintiff has appealed to this court assigning as error the trial court's sustaining the defendants' demurrers.

When reviewing a ruling on a general demurrer, an appellate court is required to accept as true all facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the conclusions of the pleader. *Lawyers Title Ins. Corp. v. Hoffman*, 245 Neb. 507, 513 N.W.2d 521 (1994).

On May 4, 1991, the plaintiff was admitted to the Hospital complaining of pain in her lower abdomen. At that time, she was seen by Dr. Adam, and after consultation with Dr. Adam, he recommended that the plaintiff undergo a procedure to remove cysts from her ovaries and sterilization, both through a laproscopic surgical procedure. The plaintiff verbally consented to both procedures, the latter to prevent conception. The plaintiff signed a permit authorizing Dr. Adam to perform both procedures.

The operation was performed the next day by Dr. Adam at the Hospital; however, the sterilization procedure was never completed. Subsequent to the surgery, the plaintiff received postoperative information and counseling regarding her sterilization procedure.

Subsequent to the plaintiff's surgery, the plaintiff resumed marital relations with her husband. Approximately 8 weeks after the surgery, the plaintiff's husband was informed by Dr. Adam's office that the sterilization procedure had not been performed.

The plaintiff claimed that as a result of Dr. Adam's and the Hospital's (1) failing to perform the tubal sterilization, (2) counseling of the plaintiff as to the postoperative consequences of the tubal sterilization, and (3) failing to timely inform the plaintiff of the omission to perform the tubal sterilization, the plaintiff and her husband resumed marital relations without the use of birth control procedures.

On July 20, 1991, the plaintiff was informed that she was pregnant. The child was conceived between May 14 and 30,

1991. On February 5, 1992, the plaintiff's son was born as a result of the pregnancy.

For her second cause of action, the plaintiff alleged that she entered into a contract with Dr. Adam and the Hospital whereby the defendants agreed to perform a tubal sterilization. The plaintiff further alleged that the defendants breached the contract by failing to perform the sterilization and that the breach was the cause of the pregnancy and birth of her son.

The plaintiff claimed damages for prenatal and birthing expenses and sought child-rearing expenses up to and beyond her son's age of majority. The plaintiff also claimed physical pain and suffering, mental and emotional pain and suffering, loss of consortium, and loss of wages.

In her second amended petition, the plaintiff alleged the defendants were qualified as health care providers under the Nebraska Hospital-Medical Liability Act, Neb. Rev. Stat. § 44-2801 et seq. (Reissue 1988 & Cum. Supp. 1990). She affirmatively waived her right to a medical review panel pursuant to § 44-2840(4).

Section 44-2821 provides in part:

> (2) If a health care provider shall qualify under the Nebraska Hospital-Medical Liability Act, the patient's exclusive remedy against the health care provider or his or her partner, employer, or employees for alleged malpractice, professional negligence, failure to provide care, breach of contract relating to providing medical care, or other claim based upon failure to obtain informed consent for an operation or treatment shall be as provided by the Nebraska Hospital-Medical Liability Act unless the patient shall have elected not to come under the provisions of such act. Unless the patient or his or her representative shall have (a) elected not to be bound by the terms of the Nebraska Hospital-Medical Liability Act, (b) filed such election with the director in advance of any treatment, act, or omission upon which any claim or cause of action is based, and (c) notified the health care provider of election as soon as is reasonable under the circumstances that such patient has so elected, it shall be conclusively presumed that the patient has elected to be bound by the terms and

provisions of the Nebraska Hospital-Medical Liability Act.

The plaintiff did not allege an election on her part not to be bound by the provisions of the act. Accordingly, the provisions of the act provide the plaintiff's exclusive remedy against the defendants.

A cause of action arising while a patient and health care provider are subject to the Nebraska Hospital-Medical Liability Act is to be adjudicated in accordance with the provisions of the act. *Barry v. Bohi*, 221 Neb. 651, 380 N.W.2d 249 (1986).

Malpractice or professional negligence is defined under the Nebraska Hospital-Medical Liability Act as follows:

> Malpractice or professional negligence shall mean that, in rendering professional services, a health care provider has failed to use the ordinary and reasonable care, skill, and knowledge ordinarily possessed and used under like circumstances by members of his profession engaged in a similar practice in his or in similar localities. In determining what constitutes reasonable and ordinary care, skill, and diligence on the part of a health care provider in a particular community, the test shall be that which health care providers, in the same community or in similar communities and engaged in the same or similar lines of work, would ordinarily exercise and devote to the benefit of their patients under like circumstances.

§ 44-2810.

The plaintiff has failed to allege in her petition that the defendants, in rendering professional services, failed to use the ordinary and reasonable care, skill, and knowledge ordinarily possessed and used under like circumstances by health care providers practicing in Adams County or similar communities. The trial court correctly sustained the defendants' demurrers as to the plaintiff's first cause of action for medical malpractice.

The plaintiff's second cause of action was for breach of contract by the defendants.

Breach of contract actions are restricted by the Nebraska Hospital-Medical Liability Act. Section 44-2818 states in part:

> No liability shall be imposed upon any health care provider on the basis of an alleged breach of an express or

> implied contract assuring results to be obtained from any procedure undertaken in the course of health care, unless such contract is expressly set forth in writing and is signed by such health care provider or by an authorized agent of such health care provider.

The plaintiff's second amended petition does not allege a contract expressly set forth in writing, signed by the defendants or their authorized agents regarding an express or implied contract assuring the results to be obtained from the procedures undertaken by Dr. Adam in the health care of the plaintiff. The only allegation concerning a written document of any kind refers to the permit signed by the plaintiff authorizing the sterilization procedure.

The trial court correctly sustained the defendants' demurrer as to the plaintiff's second cause of action as well.

When a demurrer to a petition is sustained, the trial court must grant the plaintiff leave to amend the petition unless it is clear that no reasonable possibility exists that by repleading the plaintiff will be able to correct the defective petition. After the demurrer has been sustained, but where there is a reasonable possibility that the defective petition may be cured by amendment, denying the plaintiff the opportunity to replead is an abuse of discretion. *Concerned Citizens v. Department of Environ. Contr.*, 244 Neb. 152, 505 N.W.2d 654 (1993). See, also, *Lawyers Title Ins. Corp. v. Hoffman*, 245 Neb. 507, 513 N.W.2d 521 (1994).

Although the trial court correctly sustained the defendants' demurrers to the plaintiff's second amended petition, the trial court erred in dismissing the plaintiff's second amended petition without leave to amend, because it may be possible for the plaintiff to state a cause of action for medical malpractice against the defendants in an amended petition.

A question has been raised by the parties' briefs concerning the appropriate measure of damages in a cause of action for medical malpractice where a healthy, normal child is born after an unsuccessful sterilization operation. Courts from many jurisdictions have dealt with this issue, and the majority of jurisdictions have held that parents of a healthy, normal child born after an unsuccessful sterilization operation may not

recover child-rearing costs, but may recover damages for such child for prenatal and delivery medical expenses; for emotional distress, loss of wages, pain and suffering, and loss of consortium caused by the failed sterilization, pregnancy, and childbirth; and for any costs associated with a second corrective sterilization procedure. *Girdley v. Coats*, 825 S.W.2d 295 (Mo. 1992); *McKernan v. Aasheim*, 102 Wash. 2d 411, 687 P.2d 850 (1984).

There are a variety of reasons for denying recovery of child-rearing costs for a normal child born as the result of medical malpractice. The Washington Supreme Court summarized these reasons in *McKernan v. Aasheim, supra*. It stated:

> Many hold that the benefits of joy, companionship, and affection which a healthy child can provide outweigh the costs of rearing that child. . . .
>
> Another common rationale is that recovery of child-rearing costs would be a windfall to the parents and an unreasonable burden on the negligent health care provider. . . .
>
> Still other courts have denied recovery in order to protect the psyche of the child who is the subject of the action . . . .
>
> Other reasons for denying recovery of child-rearing costs include the speculative nature of the damages . . . and the possibility of fraudulent claims.

Id. at 414-16, 687 P.2d at 852-53.

Damages which are uncertain, speculative, or conjectural cannot be a basis for recovery. *Karpf v. Karpf*, 240 Neb. 302, 481 N.W.2d 891 (1992). "The costs of child rearing—and especially education—are necessarily speculative." *Girdley v. Coats*, 825 S.W.2d at 298.

Because of the speculative nature of the damages, the cost of rearing a healthy, normal child born as the result of medical malpractice cannot be recovered. However, damages for such child for prenatal and delivery medical expenses; for emotional distress, loss of wages, pain and suffering, and loss of consortium caused by the failed sterilization, pregnancy, and childbirth; and for any costs associated with a second corrective

sterilization procedure, if proven, may be recovered.

The trial court's judgment dismissing the plaintiff's second amended petition without leave to amend is reversed, and the cause is remanded to the trial court for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

BOSLAUGH, J., participating on briefs.

STANLEY F. BARTA, JR., AND DORENE BARTA, HUSBAND AND WIFE, APPELLEES, V. RANDY KINDSCHUH AND JEANEEN KINDSCHUH, HUSBAND AND WIFE, DEFENDANTS AND THIRD-PARTY PLAINTIFFS, APPELLANTS, AND COLDWELL BANKER DOVER CO., A CORPORATION, AND TOM HAIAR, THIRD-PARTY DEFENDANTS, APPELLEES.

518 N.W.2d 98

Filed June 24, 1994. No. S-92-1018.

1. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
2. **Summary Judgment.** Summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. **Contracts: Real Estate: Principal and Agent.** A real estate agent owes his principal a fiduciary duty to use reasonable care, skill, and diligence in performing his obligations and to act honestly and in good faith. The relationship may be governed by a contract, and in such a case, the contract may also define the obligations of the agent.
4. **Principal and Agent: Liability.** When an agent fails to fulfill his agency duties, the agent may be held liable to the principal for losses suffered by the principal.
5. _____: _____. If the principal authorized an agent's acts, or otherwise acquiesced in or ratified such acts, the agent will not be held liable to the principal for the losses resulting from those acts.

Appeal from the District Court for Cuming County: ROBERT B. ENSZ, Judge. Affirmed.

Thomas B. Donner for appellants.

Michael T. Brogan, of Brogan & Stafford, P.C., for appellees Coldwell Banker Dover and Tom Haiar.

HASTINGS, C.J., WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ.

WHITE, J.

Appellants, Randy Kindschuh and Jeaneen Kindschuh (sellers), are third-party plaintiffs in an action against appellees Coldwell Banker Dover Co. and its selling agent, Tom Haiar, third-party defendants, for misrepresentation, breach of contract, and breach of fiduciary duties. The district court granted Coldwell and Haiar's motion for summary judgment, and sellers appealed. We affirm.

The following constitutes a summary of the relevant facts: In 1989, sellers retained Effie Larson, a Coldwell agent, to sell their house. In connection with Larson's representation of sellers, Larson and sellers completed, but did not sign, a "Property Disclosure Information" form.

The form is designed to provide information which agents use when showing the house to potential buyers. The two-page form lists seven major topics related to items around the house: plumbing, electrical, structure, insulation, heating and cooling, kitchen equipment, and miscellaneous. Below each numbered topic is a list of several related items. Beside each item is a blank line on which the condition of each topic is to be provided. For example, the item with which we are concerned in this case appears as follows:

3. STRUCTURE	CONDITION
Roof	_____
Has roof ever leaked or been repaired?	_____
Foundation	_____
Basement/Water	_____

The form completed in this case indicates that the condition of the roof is "good" and that the roof has never leaked or been

repaired. Above the signature line the form provides that "any inconsistencies with the above statement shall be [sellers'] personal responsibility. Coldwell Banker Dover Realtors as my agent, shall have no responsibility in repairing or replacing any of these items." (Emphasis in original.)

Sellers became dissatisfied with Larson and requested that Haiar, another Coldwell agent, market their house. On January 21, 1990, Haiar and sellers met at sellers' house and reviewed the information provided in the disclosure form that had been prepared by sellers and Larson. When Haiar asked about the condition of the roof, sellers told Haiar that the roof had recently developed some leaks. These new leaks were not repaired by sellers.

With regard to this discussion on January 21, there are some factual discrepancies between the evidence presented by Haiar and that presented by sellers. Haiar states that sellers told him that the roof had begun to leak, but that the leaks had been fixed. Sellers state that they only told Haiar of the new leak and showed Haiar the spot in the attic where the leak was evident.

Neither Haiar nor sellers made any changes to the form with regard to the condition of the roof. Although sellers knew the form stated that the roof was in good condition and had never been repaired, they signed the form on January 21. Sellers stated that they assumed Haiar would make the necessary changes to the form. Haiar stated that he gave the form to sellers to read and sign and that he left it to them to decide what information to disclose on the form.

Subsequently, Stanley F. Barta, Jr., and Dorene Barta (buyers) purchased the house. After discovering several problems with the condition of the house, buyers filed a lawsuit against sellers alleging that sellers made material misrepresentations regarding the condition of the house. The alleged acts of misrepresentation arise from the information regarding the condition of the roof that was contained in the disclosure form. The buyers maintain that they read the form prior to the purchase and that they would not have purchased the house if they had known about its actual condition.

The case before this court involves the third-party action commenced by sellers against Coldwell and Haiar. Sellers allege

that Haiar was their agent in the sale and that Haiar should be liable for any losses incurred because of his actions as sellers' agent. In their petition, sellers raise three alternative theories of recovery: misrepresentation, breach of contract, and breach of the fiduciary duty of care. We note that in their action entitled "misrepresentation," sellers allege that appellees made knowingly false representations to *buyers*, and therefore appellees should be liable for any damages sellers may incur in the main action.

The district court granted Coldwell and Haiar's motion for summary judgment. The court found that the property disclosure form was dispositive of any issue of liability. Sellers timely filed a notice of appeal to the Court of Appeals. On our own motion, the action was moved to this court.

Sellers allege that the district court erred in finding that there was no genuine issue of material fact and granting summary judgment.

In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Franksen v. Crossroads Joint Venture*, 245 Neb. 863, 515 N.W.2d 794 (1994); *Schmidt v. Omaha Pub. Power Dist.*, 245 Neb. 776, 515 N.W.2d 756 (1994); *Rowe v. Allely*, 244 Neb. 484, 507 N.W.2d 293 (1993). Summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Larson v. Vyskocil*, 245 Neb. 917, 515 N.W.2d 660 (1994); *Franksen, supra*; *Schmidt, supra*; *Rowe, supra.*

Each of the theories of liability asserted by sellers arises from the alleged misrepresentation that was contained in the disclosure form regarding the condition of the roof. The issue which we are asked to address is whether Coldwell and Haiar, as agents of sellers, are liable for any damages suffered by sellers for that alleged misrepresentation.

A real estate agent owes his principal a fiduciary duty to use

reasonable care, skill, and diligence in performing his obligations and to act honestly and in good faith. *Firmature v. Brannon*, 223 Neb. 123, 388 N.W.2d 119 (1986); *Tetherow v. Wolfe*, 223 Neb. 631, 392 N.W.2d 374 (1986); *Vogt v. Town & Country Realty of Lincoln, Inc.*, 194 Neb. 308, 231 N.W.2d 496 (1975). Additionally, the relationship may be governed by a contract, and in such a case, the contract may also define the obligations of the agent. When an agent fails to fulfill his agency duties, the agent may be held liable to the principal for losses suffered by the principal. *Walker Land & Cattle Co. v. Daub*, 223 Neb. 343, 389 N.W.2d 560 (1986); *Vogt, supra*; Restatement (Second) of Agency, Introductory Note for §§ 376 to 398 (1958); 3 C.J.S. *Agency* §§ 297 and 461 (1973); Harold G. Reuschlein & William A. Gregory, The Law of Agency and Partnership §§ 65 to 81 (2d ed. 1990).

However, if the principal authorized the agent's acts, or otherwise acquiesced in or ratified such acts, the agent will not be held liable to the principal for the losses resulting from those acts. See, *McNamara v. Johnston*, 522 F.2d 1157, 1165 (7th Cir. 1975) (explaining that "as between agent and principal, an agent cannot be held liable for the use of the principal's property in an unlawful manner when it is reasonable to infer that the principal authorized the agent's conduct"); *Olson v. Thompson*, 273 Minn. 152, 140 N.W.2d 321 (1966) (stating that although the actions of the agent constituted a tort, the agent is not liable to the principal for damages arising from such actions because the agent was acting in accordance with the principal's instructions); *Gutting v. Jacobson*, 184 Neb. 402, 167 N.W.2d 762 (1969) (stating that an agent is liable to the principal for violations of the agent's fiduciary duties, but that a principal may by acquiescence release the agent from such liability); *Kidd v. Maldonado*, 688 P.2d 461 (Utah 1984) (finding that although the agent completed an earnest money agreement contrary to the principal-seller's instructions, the seller ratified the agent's acts when the seller read and signed the agreement); Restatement, *supra*, § 401, comment *d*. Cf., *Putnam v. DeRosa*, 963 F.2d 480 (1st Cir. 1992) (holding that a principal does not have an action against his agent for indemnification based on the agent's misrepresentations because the principal

was not "blameless" in the misrepresentations made to the third parties); *Warner v. Reagan Buick*, 240 Neb. 668, 483 N.W.2d 764 (1992); *City of Wood River v. Geer-Melkus Constr. Co.*, 233 Neb. 179, 444 N.W.2d 305 (1989) (discussing indemnification actions and stating that a party seeking indemnification must have been free from any wrongdoing); *Hiway 20 Terminal, Inc. v. Tri-County Agri-Supply, Inc.*, 232 Neb. 763, 443 N.W.2d 872 (1989); Restatement, *supra*, § 411, comments *c.* and *d.* (stating that if both the principal and the agent are aware that the performance of an act is wrongful, ordinarily the agent is not liable to indemnify the principal for damages arising from the performance of that act).

In a case factually similar to the case before us, the Supreme Court of Utah considered whether the seller had ratified the wrongful acts of his agent. In *Kidd, supra*, the seller of a home retained a real estate agent to assist in the marketing and sale of the home. After a buyer was located, the seller instructed the agent to prepare an earnest money agreement. The seller contended that he instructed the agent to include in the agreement a "subject to" provision, which would have provided that *sale* of the house was subject to seller relocating to another house. Contrary to those instructions, the agent drafted an agreement which provided that *possession* of the house by buyers was subject to relocation of the seller. Seller signed the earnest money agreement as drafted by the agent. Seller did not acquire another house and refused to complete the sale to buyers. Buyers then sued seller for specific performance of the sale contract, and seller filed a third-party petition against the agent. The trial court granted summary judgment in favor of the agent.

On appeal, seller argued that the agent violated the agency-principal relationship because the agent drafted an agreement in violation of the seller's specific instructions. According to seller, therefore, the agent should have been liable for damages suffered by seller in the main action. The court, however, rejected seller's argument.

The court stated that as an agent of the seller, the agent owed a duty to the seller to conduct the sale in accordance with the seller's instructions. The court found that the evidence

established that the agent violated that duty when the agent drafted an earnest money agreement that contained a clause other than that requested by the seller. The court also found that before the agreement was presented to the buyers and before the seller signed the agreement, the seller read the agreement which included the disputed "subject to" clause. The court stated that the seller did not question the language in the agreement and did not ask that the agent change the language. The court noted that the language of the agreement was unambiguous, nontechnical, and "readily understandable." 688 P.2d at 462. Additionally, there was no evidence that the agent engaged in any fraud or misrepresentation which may have induced the seller to sign the agreement.

The court held that the agent was not liable to the seller. The court reasoned that when a principal sees and understands the acts of his agent, "the law does not permit the principal to ignore what is obvious, even if it be contrary to his instructions." *Id.* The court explained that if an agent exceeds his express authority, the principal may by ratification release the agent from liability for damages incurred by the principal. See, Restatement, *supra*, § 416; *Southwest Title Ins. Co. v. Northland Bldg.*, 542 S.W.2d 436 (Tex. Civ. App. 1976), *modified on other grounds* 552 S.W.2d 425 (Tex. 1977). The court stated that the seller knew and was capable of understanding the acts of the agent as expressed in the agreement and that the seller voluntarily signed the agreement and permitted the agreement to be presented to the buyers. The court held that by these acts the seller ratified and approved of the agent's acts and that, thus, as between the seller and the agent, the seller could not hold the agent liable for the resulting damages.

Similarly, in the present case we assume that Haiar violated a duty owed to the sellers when Haiar did not change the information provided in the disclosure form to reflect that the roof had begun to leak before sellers signed the form. There is no factual dispute, however, that after this discussion between sellers and Haiar regarding the leak, sellers were permitted to read over the form, that the form was easy to understand, and that sellers did not question the written statement regarding the

condition of the roof. The release of liability language in the form further emphasized that sellers were responsible for the information contained in the form.

Additionally, the sellers do not allege and the evidence does not indicate that the agent fraudulently induced the sellers to sign the form. In the depositions by sellers, they state that they "assumed" that Haiar would make any necessary changes to the form at a later date. The sellers do not contend that their assumption was based on any acts or representations of Haiar. See *Tetherow v. Wolfe*, 223 Neb. 631, 392 N.W.2d 374 (1986) (finding that agent misrepresented the effect of the agreement he prepared for principal and induced principal to sign the agreement).

We therefore find that even if Haiar exceeded his authority as sellers' agent by failing to change the form to reflect the information provided by sellers, the law will not afford sellers protection for ignoring the obvious. When sellers read and signed the form which included misrepresentations regarding the condition of the roof, sellers acquiesced in and ratified the acts of their agent, thereby releasing the agent from liability to sellers for the resulting damages.

The decision of the district court regarding the third-party action between sellers and Coldwell and Haiar is hereby affirmed.

AFFIRMED.

BOSLAUGH, J., participating on briefs.

VIRGIL D. ANDERSON AND ROSE M. ANDERSON, APPELLANTS, V. ELAINE J. MATTHIS, APPELLEE.

518 N.W.2d 94

Filed June 24, 1994. No. S-92-1024.

1. **Motions to Dismiss: Pleadings: Demurrer.** A motion to dismiss another's action prior to trial is not a permissible pleading in Nebraska. Under certain circumstances, and where, by stipulation of the parties or court rule, it is allowed, such an irregular motion may be treated as a demurrer.

2. **Demurrer.** The two procedures of demurrer and dismissal are distinct. If a demurrer is sustained, the case still pends.
3. **Pleadings: Demurrer.** Following the sustaining of a demurrer, the losing party is entitled to amend the pleadings unless there exists no reasonable possibility that amendment will remedy the deficiency.
4. **Motions to Dismiss.** If a motion to dismiss is sustained, the case ends.
5. **Judgments: Pleadings: Demurrer.** Res judicata may be raised in a demurrer when the pleading challenged by the demurrer sets forth the facts to which the rule of res judicata applies.
6. **Actions: Pleadings: Demurrer.** Neb. Rev. Stat. § 25-806(3) (Reissue 1989) allows a defendant to demur to a petition when it appears on its face that there is another action pending between the same parties for the same cause.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Reversed and remanded for further proceedings.

James D. Sherrets and Mark L. LaFontaine, of Sherrets Smith & Gardner, P.C., for appellants.

Wesley E. Hauptman for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ.

FAHRNBRUCH, J.

By petition, Virgil D. Anderson and Rose M. Anderson asked a district court to declare that Elaine J. Matthis, as an owner and user of an easement on the Andersons' property, and Matthis' successors are responsible for half the cost of maintaining and improving the real estate on which the easement is located.

Matthis filed a "pretrial motion to dismiss" in which she claims that res judicata bars the Andersons' lawsuit. The district court for Douglas County sustained Matthis' motion to dismiss. The Andersons appealed.

Because Nebraska does not recognize a pretrial motion to dismiss as a permissible pleading, we reverse the district court's ruling and remand the cause to that court for further proceedings.

FACTS

In their petition, the Andersons allege the following facts: In January 1981, Matthis acquired a parcel of real property in

Douglas County. As part of the conveyance, she also acquired, for ingress and egress to her property, a temporary easement over certain property adjoining hers. The conveyance setting forth the easement was filed of record in the register of deeds' office for Douglas County on March 5. The Andersons are owners of the property on which the easement is located. The property was deeded to the Andersons on June 26, and they received it subject to easements of record.

In December 1991, Matthis filed suit in the district court for Douglas County to enjoin the Andersons from disturbing Matthis' use of the temporary easement (Anderson I). The district court granted Matthis continuous use of the easement.

The Andersons appealed the Anderson I ruling to the Nebraska Court of Appeals. While that appeal was pending, the Andersons filed this action (Anderson II). The Andersons' petition requests a declaration that, in the event the Nebraska Court of Appeals affirmed Anderson I, Matthis and her successors in interest will be responsible for reimbursing the Andersons for half the past costs of maintaining and improving the easement since Matthis became owner of the adjacent property. In addition, the Andersons requested a declaration that Matthis and her successors in interest will be responsible for half the future costs of maintaining the easement.

Rather than filing an answer or a demurrer to the Andersons' petition, Matthis filed a motion to dismiss the Andersons' petition on the grounds that the issues raised were res judicata and that an action involving the same issues was pending at that time before the Court of Appeals. After a hearing on that motion, the district court found that the Andersons could have raised the issue of maintenance and improvement costs in Anderson I, but failed to do so. The court further found that under the doctrine of res judicata, the Andersons could not raise the issues in a separate lawsuit. Whereupon, the district court sustained Matthis' motion to dismiss the Andersons' petition.

The Andersons filed a motion for reconsideration of the order dismissing their petition, which the district court overruled. The Andersons timely appealed.

Subsequent to the district court's dismissal of Anderson II and the Andersons' appeal to this court, the Court of Appeals

found that the appeal of Anderson I was not timely filed and dismissed it for lack of jurisdiction. *Matthis v. Anderson*, 94 NCA No. 12, case No. A-92-692 (not designated for permanent publication).

ASSIGNMENTS OF ERROR

Summarized and restated, the Andersons claim that the district court erred in (1) disposing of their action on a "pretrial motion to dismiss" and (2) finding that the doctrine of res judicata bars them from litigating the issue of whether Matthis should be required to pay half the costs of maintaining and improving the easement.

ANALYSIS

A motion to dismiss another's action prior to trial is not a permissible pleading in Nebraska. Neb. Rev. Stat. § 25-803 (Reissue 1989); *In re Application of City of Lincoln*, 243 Neb. 458, 500 N.W.2d 183 (1993); *Pappas v. Sommer*, 240 Neb. 609, 483 N.W.2d 146 (1992); *Cool v. Sahling Trucks, Inc.*, 237 Neb. 312, 466 N.W.2d 71 (1991); *United States Fire Ins. Co. v. Affiliated FM Ins. Co.*, 225 Neb. 218, 403 N.W.2d 383 (1987); *Voyles v. DeBrown Leasing, Inc.*, 222 Neb. 250, 383 N.W.2d 36 (1986).

Under certain circumstances, and where, by stipulation of the parties or court rule, it is allowed, such an irregular motion may be treated as a demurrer. *United States Fire Ins. Co., supra*; *Voyles, supra*; *Nelson v. Sioux City Boat Club*, 216 Neb. 484, 344 N.W.2d 634 (1984); *Blitzkie v. State*, 216 Neb. 105, 342 N.W.2d 5 (1983). Cf. *First Nat. Bank v. Schroeder*, 218 Neb. 397, 355 N.W.2d 780 (1984) (treating a pretrial motion to dismiss as a demurrer where the district court had sustained the motion to dismiss *but allowing the party to amend the pleading as if it were a demurrer*). Such circumstances do not exist in this case.

We cannot, as a matter of convenience, treat Matthis' pretrial motion to dismiss as a demurrer. The two procedures of demurrer and dismissal are distinct. See *State, ex rel. Johnson, v. Consumers Public Power District*, 142 Neb. 114, 5 N.W.2d 202 (1942). If a demurrer is sustained, the case still pends. *Cagle, Inc. v. Sammons*, 198 Neb. 595, 254 N.W.2d 398 (1977). Following the sustaining of a demurrer, the losing party is

entitled to amend the pleadings unless there exists no reasonable possibility that amendment will remedy the deficiency. *DeVaux v. DeVaux*, 245 Neb. 611, 514 N.W.2d 640 (1994). If a motion to dismiss is sustained, the case ends. *State, ex rel. Johnson, supra*.

Furthermore, we have no procedure or method of review for allowing cases to proceed upon an impermissible pleading, such as a pretrial motion to dismiss. As this court stated in *Nelson*, 216 Neb. at 486, 344 N.W.2d at 635-36:

> Questions as to the burden of proof, or the res judicata effect of a judgment based on a pleading not recognized by this state, should not be determined academically. There are enough uncertainties in the law without expanding them by introducing procedures not contained in our statutes or court rules.
>
> We are not by this action exalting form over substance, but we are stating that procedural laws as to the conduct of civil litigation must be followed in order to let trial courts and appellate courts maintain some uniformity as to the posture of cases ripe for decision.

Matthis' motion claims that the Andersons' petition is barred by res judicata and because an appeal in Anderson I was pending at that time. Res judicata may be raised in a demurrer when the pleading challenged by the demurrer sets forth the facts to which the rule of res judicata applies. *DeVaux, supra*; *Card v. Card*, 174 Neb. 124, 116 N.W.2d 21 (1962). In addition, Neb. Rev. Stat. § 25-806(3) (Reissue 1989) allows a defendant to demur to a petition when it appears on its face that "there is another action pending between the same parties for the same cause." Therefore, if the Andersons' petition sets forth facts to establish res judicata or to show that the action pending in the Court of Appeals was for the same cause, the proper method for raising Matthis' arguments would have been by demurrer.

Because the posture of this case at the present time does not allow us to review the district court's order of dismissal, we reverse the judgment of the district court and remand the cause for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. JAMES ROBERT BLACKSTONE, RESPONDENT.

517 N.W.2d 400

Filed June 24, 1994. No. S-94-265.

Original action. Judgment of disbarment.

HASTINGS, C.J., BOSLAUGH, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ.

PER CURIAM.

In this disciplinary action a complaint against James Robert Blackstone was filed with the Counsel for Discipline of the Nebraska State Bar Association. On June 6, 1994, a pleading was filed with the Nebraska Supreme Court in which Blackstone voluntarily surrendered his license to practice law. We accept Blackstone's surrender and order Blackstone disbarred.

Although Blackstone took the Nebraska bar examination in July 1991, he was not admitted to the Nebraska bar until February 1993. During the period between taking the exam and being admitted to the Nebraska bar, Blackstone engaged in criminal acts which he did not disclose to the Nebraska bar prior to his admission.

On October 9 and 28, 1991, Blackstone offered forged checks in the amount of $250 and $500 to the Marquette Bank in Minneapolis, Minnesota. Blackstone admits that he presented the forged checks with the intent to defraud. On February 24, 1992, Blackstone was charged with felony forgery. After successfully completing a pretrial diversion program, the charge was dismissed in April 1993.

Blackstone's conduct was discovered by the Nebraska disciplinary office when Blackstone applied for admission to the Minnesota bar. Upon reviewing his application, the Minnesota bar discovered the above-described acts and contacted the Nebraska bar. Subsequently, a complaint was filed against Blackstone by the Nebraska Counsel for Discipline.

Pursuant to Neb. Ct. Rule of Discipline 15 (rev. 1992), Blackstone voluntarily surrenders his license to practice law. In

his pleading to surrender, Blackstone admits that the allegations contained in the complaint are true and that he has violated Canon 1, DR 1-102(A)(1), (3), and (4) of the Code of Professional Responsibility. Blackstone waives his right to notice and hearing prior to an entry of this court's order.

Blackstone's admissions demonstrate to this court that Blackstone has been engaged in dishonest and fraudulent conduct which will not be tolerated. We thus accept Blackstone's surrender and order him disbarred from the practice of law in Nebraska, effective immediately.

JUDGMENT OF DISBARMENT.

WHITE, J., not participating.

TRAILBLAZER PIPELINE COMPANY ET AL., APPELLEES, V. M. BERRI BALKA, STATE TAX COMMISSIONER, AND NEBRASKA DEPARTMENT OF REVENUE, APPELLANTS.

518 N.W.2d 646

Filed July 1, 1994. No. S-92-317.

Constitutional Law: Taxation: Proof. A taxpayer who seeks a refund of taxes which are claimed to have been invalid as in violation of the constitutional provision requiring uniformity and proportionality in the taxation of tangible property is at most entitled to a refund of the difference between the taxes levied against the property and the taxes if all of the property treated as exempt had been placed on the rolls and taxed. In such a proceeding, the burden is upon the taxpayer to prove the amount of the refund to which he may be entitled.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, and HANNON and MILLER-LERMAN, Judges, on appeal thereto from the District Court for Lancaster County, WILLIAM D. BLUE, Judge. Judgment of Court of Appeals reversed.

Don Stenberg, Attorney General, and L. Jay Bartel for appellants.

William R. Johnson, of Kennedy, Holland, DeLacy & Svoboda, for appellees.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ.

BOSLAUGH, J.

The plaintiffs, Trailblazer Pipeline Company, Natural Gas Pipeline Company of America, and Mid-America Pipeline Company, applied for a refund of their 1987 personal property taxes from the defendant Tax Commissioner M. Berri Balka. The plaintiffs' request for refund was denied by the defendant Tax Commissioner. The Department of Revenue is also a defendant. The plaintiffs appealed the defendant Tax Commissioner's order to the district court, which reversed the order. The defendants appealed to the Nebraska Court of Appeals the district court's order requiring the Department of Revenue to refund to the plaintiffs all taxes paid upon their personal property in 1987. The Court of Appeals affirmed the district court's order, see *Trailblazer Pipeline Co. v. Balka*, 93 NCA No. 49, case No. A-92-317 (not designated for permanent publication), and this court granted the defendants' petition for further review.

The plaintiffs are natural gas pipeline companies. Their personal property is centrally assessed for tax purposes.

The equalization rate for all centrally assessed taxpayers, including car companies, railroads, and pipeline companies, was set by the State Board of Equalization and Assessment on August 10, 1987. The plaintiffs timely paid their 1987 property taxes at such rate in November 1987 and June 1988 to each of the counties in which they operated.

On October 30, 1989, the plaintiffs made written demand upon the defendant Tax Commissioner for a refund of their 1987 personal property taxes. The plaintiffs' demand was based upon the invalidity of the imposed personal property tax, within the meaning of Neb. Rev. Stat. § 77-1776 (Reissue 1986).

A hearing was held before the defendant Tax Commissioner, who denied the plaintiffs' claim for a refund. The plaintiffs appealed the defendant Tax Commissioner's ruling pursuant to Neb. Rev. Stat. § 84-917 (Cum. Supp. 1992) of the Administrative Procedure Act.

The district court found that despite the repeal of § 77-1776 in 1989, the general saving statute, Neb. Rev. Stat. § 49-301 (Reissue 1988), preserved the plaintiffs' right to recover a refund on an invalid tax and that the 1987 personal property taxes imposed upon the plaintiffs were invalid. The district court held that the plaintiffs were entitled to a full refund of their 1987 personal property taxes.

The defendants appealed the district court's order to the Court of Appeals, which affirmed the district court's judgment in the opinion which was not designated for permanent publication.

In their petition for further review, the defendants assign as error the Court of Appeals' failure to follow this court's decisions in *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 242 Neb. 263, 494 N.W.2d 535 (1993), *cert. denied* ____ U.S. ____, 113 S. Ct. 2930, 124 L. Ed. 2d 681, and *AMISUB v. Board of Cty. Comrs. of Douglas Cty.*, 244 Neb. 657, 508 N.W.2d 827 (1993).

The plaintiffs brought their claims for refund under § 77-1776, contending the personal property taxes they paid in 1987 were invalid because they were in violation of the uniformity requirements of article VIII, § 1, of the Nebraska Constitution and the Equal Protection Clause of the 14th Amendment to the U.S. Constitution.

In the *AMISUB* case, the plaintiff brought an action to recover real and personal property taxes paid for the year 1989. The petition asserted that the taxes assessed, levied, and paid by the plaintiff for 1989 were unconstitutional because the taxes violated Nebraska's uniformity clause and the Equal Protection Clause of the 14th Amendment to the U.S. Constitution. This court stated and held:

> AMISUB's theory of recovery seems to be that because the exemptions granted to certain taxpayers were unconstitutional, AMISUB is to be placed in the same position as those taxpayers which escaped taxation by receiving a full refund of the taxes paid. That is not the rule to come out of any of the recent tax cases beginning with *Northern Natural Gas Co. v. State Bd. of Equal.*, 232 Neb. 806, 443 N.W.2d 249 (1989), *cert. denied* 493 U.S.

> 1078, 110 S. Ct. 1130, 107 L. Ed. 2d 1036 (1990), and culminating in *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 242 Neb. 263, 494 N.W.2d 535 (1993). At most, AMISUB would be entitled to a refund of the difference between the taxes levied against the property of AMISUB and the taxes which AMISUB would have been required to pay if all of the property treated as exempt had been placed on the tax rolls and taxed. See *id.* Contrary to the facts developed in *MAPCO Ammonia Pipeline* as to the ratio between property which was treated as exempt plus the value of property of the railroads and the value of all tangible property in Nebraska, the record here contains no evidence upon which such a determination could be made. Therefore, AMISUB has failed to meet its burden of establishing these facts, and its petition was properly dismissed.

AMISUB, 244 Neb. at 664, 508 N.W.2d at 832.

The theory of recovery of the plaintiffs' taxes in the present case is the same as the plaintiff's in *AMISUB*. Also, as the plaintiff in *AMISUB*, the plaintiffs in this case have failed to establish facts showing the amount of refund to which they are entitled.

The Court of Appeals erred in affirming the district court's order allowing the plaintiffs a full refund of their personal property taxes for 1987. Since the plaintiffs failed to establish facts showing the amount of refund to which they are entitled, the plaintiffs' action should have been dismissed.

Because of our disposition of this assignment of error, it is unnecessary to discuss the other assigned errors in the defendants' petition for further review.

The judgment of the Court of Appeals is reversed.

REVERSED.

CARLA FITZPATRICK, APPELLANT, V. U S WEST, INC., A COLORADO CORPORATION, ET AL., APPELLEES.

518 N.W.2d 107

Filed July 1, 1994. No. S-92-580.

1. **Summary Judgment: Appeal and Error.** In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
2. **Summary Judgment.** Summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. **Pleadings: Actions.** Although a petition should not leave uncertainty as to the theory on which the pleader wishes to proceed, in actions not involving extraordinary remedies, general pleadings are to be liberally construed in favor of the pleader.
4. **Independent Contractor: Agents.** One acting on behalf of another may do so as an agent or an independent contractor. The factors to be considered in distinguishing between the two are (1) the extent of control which, by the agreement, the employer may exercise over the details of the work; (2) whether the one employed is engaged in a distinct occupation or business; (3) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (4) the skill required in the particular occupation; (5) whether the employer or the one employed supplies the instrumentalities, tools, and place of work for the one doing the work; (6) the length of time for which the one employed is engaged; (7) the method of payment, whether by the time or by the job; (8) whether the work is a part of the regular business of the employer; (9) whether the parties believe they are creating an agency relationship; and (10) whether the employer is or is not in business.
5. **Negligence.** For actionable negligence to exist, there must be a legal duty on the part of the defendant to protect the plaintiff from injury, a failure to discharge that duty, and damage proximately resulting from the undischarged duty.
6. _____. "Duty" is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff; and in negligence cases, the duty is always the same—to conform to the legal standard of reasonable conduct in the light of the apparent risk.
7. **Negligence: Words and Phrases.** A duty, in negligence cases, may be defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.
8. **Negligence.** The question of whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation.
9. **Negligence: Independent Contractor: Liability.** Generally, the employer of an independent contractor is not liable for physical harm caused to another by the

acts or omissions of the contractor or his servants.

10. _____: _____: _____. The employer of an independent contractor may be liable (1) if the employer retains control over the contractor's work or (2) if, by rule of law or statute, the employer has a nondelegable duty to protect another from harm caused by the contractor.
11. _____: _____: _____. As a result of a nondelegable duty, the responsibility or ultimate liability for proper performance of a duty cannot be delegated, although actual performance of the task required by a nondelegable duty may be done by another.
12. **Negligence: Independent Contractor: Liability: Public Utilities.** Where the employer of an independent contractor could not control or have any authority over the operations conducted by its independent contractor because the independent contractor was a public utility, the employer owes no legal duty to protect an employee of the independent contractor from the hazards of conducting the independent contractor's operations.
13. **Negligence: Public Utilities: Electricity: Liability.** The connection of electricity to a building, when performed by a public utility, is not an abnormally dangerous or ultrahazardous activity, and the employer of the public utility will not be held strictly liable for injuries sustained during the course thereof.

Appeal from the District Court for Douglas County: MICHAEL MCGILL, Judge. Affirmed.

James E. Harris and Timothy K. Kelso, of Harris, Feldman, Stumpf Law Offices, for appellant.

George A. Carroll and Richard Johnson for appellees U S West, Inc., and Northwestern Bell Telephone Company.

Michael G. Mullin, of McGrath, North, Mullin & Kratz, P.C., for appellees AT&T, Inc., and AT&T Communications of the Midwest, Inc.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ.

LANPHIER, J.

The appellant, Carla Fitzpatrick, initiated this action in Douglas County District Court to recover damages for personal injuries sustained in an explosion which occurred on June 17, 1989, in an underground vault she was working in. At the time of the accident, she was employed by the Omaha Public Power District (OPPD), which was hired by appellee U S West, Inc., to reconnect electrical service to a building near the vault. U S West was the owner of the real estate where the vault was

located, but OPPD had been granted an exclusive easement to the vault and had sole access to the vault in which electrical equipment and connections were located. Fitzpatrick named as defendants the following: U S West, Inc., and Northwestern Bell Telephone Company (collectively U S West); AT&T, Inc., and AT&T Communications of the Midwest, Inc. (collectively AT&T); National Electric Company, Inc.; and OPPD. According to Fitzpatrick's third amended petition, OPPD was named as a defendant solely for the purpose of preserving its subrogation interest for amounts paid under the Nebraska Workers' Compensation Act pursuant to Neb. Rev. Stat. § 48-118 (Reissue 1988). The order Fitzpatrick appeals from did not address OPPD as a defendant, and consequently there are no issues involving OPPD as a defendant before us. Fitzpatrick filed a motion for partial summary judgment, and each of the defendants, except OPPD, filed a motion for summary judgment. The district court granted those defendants' motions for summary judgment. The grant of summary judgment in favor of National Electric Company was not appealed, and on January 12, 1993, Fitzpatrick and AT&T filed a stipulation dismissing AT&T from this action. Thus, the appeal concerns only the grant of summary judgment rendered in favor of U S West. Fitzpatrick appealed the district court's order to the Court of Appeals. We, however, removed the case to this court on our own motion in order to regulate the caseloads of the appellate courts.

The argument underlying Fitzpatrick's appeal is that the trial court erroneously analyzed this case on the theory of premises liability. Fitzpatrick states that "this action was brought under the dangerous instrumentality rule whereunder liability may be imposed on the employer of an independent contractor whose negligence causes injury." Brief for appellant at 2. Even when analyzed on this basis, Fitzpatrick's claim must fail. Contrary to what Fitzpatrick asserts, U S West did not have a nondelegable duty to protect Fitzpatrick from harm. Although U S West employed OPPD, a public utility, it had no control over OPPD's operations. U S West, as the employer of an independent contractor, had no control over the independent contractor herein, OPPD, and no legal basis for imposing

liability exists. We, therefore, affirm the judgment of the district court.

BACKGROUND

On June 17, 1989, Fitzpatrick, then employed by OPPD as a cable splicer, was one member of a crew reconnecting electrical service to a building owned by U S West. Reconnecting the electrical service to the building, located in downtown Omaha, required that certain operations be performed in underground cable vaults nearby. In order to reconnect the electrical service, Fitzpatrick was required to go inside the vault containing circuit No. 27. The crew foreman decided not to shut down circuit No. 27, and Fitzpatrick knew that circuit No. 27 had not been shut down. Inside the vault was a transformer. The transformer was used to convert, or step down, the 14,100 volts coming in through the primary cables to a lesser voltage, referred to as the secondary voltage. Here, the lesser, secondary voltage was directed to the building owned by U S West. Attached to the transformer was a network protector. The network protector, according to Fitzpatrick, acts as a circuit breaker. When reconnecting electrical service, the network protector must be grounded. Having tested a portion of the network protector to assure that it was deenergized, Fitzpatrick went about grounding the network protector. She had just finished attaching an uninsulated grounding cable when she saw a "big ball of fire." Before she was able to get out of the vault, she sustained serious burns.

U S West concedes that it requested and paid OPPD to disconnect and reconnect electrical power to its building located in downtown Omaha, near 19th and Douglas Streets. Although U S West owned the vault, it had granted OPPD an easement to build, maintain, and repair the underground utility vault. All the equipment within the vault was owned by OPPD. U S West did not have access to the vault, nor control over the activities that went on there. The vault was under the exclusive control of OPPD.

STANDARD OF REVIEW

In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom

the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Schmidt v. Omaha Pub. Power Dist.*, 245 Neb. 776, 515 N.W.2d 756 (1994). Summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Id.*

ASSIGNMENTS OF ERROR

Fitzpatrick asserts that the trial court erred (1) in sustaining the defendants' motions for summary judgment and dismissing the case using theories of premises liability, (2) in failing to apply the appropriate law imposing liability upon employers of independent contractors under certain and limited circumstances, and (3) in overruling her motion for partial summary judgment seeking a determination of the duties owed her. Nowhere does Fitzpatrick argue that genuine issues of material fact exist; rather, Fitzpatrick's argument seems to be that, given the facts of the case, U S West was not entitled to judgment as a matter of law.

THEORY OF RECOVERY PLED

Fitzpatrick first assigns as error the fact that the trial court's ruling was based upon premises liability. The third amended petition sounds in negligence. Although it would appear from the petition that Fitzpatrick may have wished to proceed on the basis of premises liability, it also appears that she may have wished to proceed in the context of employer and independent contractor. Although a petition should not leave uncertainty as to the theory on which the pleader wishes to proceed, we have held that in actions not involving extraordinary remedies, general pleadings are to be liberally construed in favor of the pleader. *Hutmacher v. City of Mead*, 230 Neb. 78, 430 N.W.2d 276 (1988). Thus, since Fitzpatrick stated the theory of employer and independent contractor liability as the theory upon which she wishes to proceed, and since her pleadings support her contention, we shall proceed on that basis.

INDEPENDENT CONTRACTOR

Fitzpatrick asserts this case should have been analyzed under the "nondelegable duty" exception to the general rule that the employer of an independent contractor is not liable for physical harm caused to another by the acts or omissions of the contractor or his servants. *Parrish v. Omaha Pub. Power Dist.*, 242 Neb. 783, 496 N.W.2d 902 (1993).

Of course, underlying Fitzpatrick's assertion is the assumption that the relationship between U S West and OPPD was that of employer and independent contractor. Thus, we are confronted with the threshold question of how to characterize U S West's relationship with OPPD. U S West has conceded that it requested and paid OPPD to disconnect and reconnect electrical power to its building; however, U S West points out that it was not subcontracting work which it could otherwise perform. OPPD has a sanctioned monopoly on the transmission of electrical power. As U S West points out, Neb. Rev. Stat. § 86-304 (Reissue 1987) makes it unlawful to "interfere with the transmission of . . . light, heat and power in this state." Moreover, it is undisputed that U S West did not have access to the underground vault in which the necessary work was to be done.

U S West argues that the relationship was not that of employer and independent contractor, nor that of principal and agent either. U S West asks that we recognize a new category for public utilities and their customers. However, U S West cites no authority, and we can find none, to support recognition of this third type of relationship, customer and public utility. Neither are we persuaded that such a category is necessary or beneficial to the resolution of this case.

In Nebraska, one acting on behalf of another may do so as an agent or an independent contractor. *Delicious Foods Co. v. Millard Warehouse*, 244 Neb. 449, 507 N.W.2d 631 (1993). The factors to be considered in distinguishing between the two are (1) the extent of control which, by the agreement, the employer may exercise over the details of the work; (2) whether the one employed is engaged in a distinct occupation or business; (3) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or

by a specialist without supervision; (4) the skill required in the particular occupation; (5) whether the employer or the one employed supplies the instrumentalities, tools, and place of work for the one doing the work; (6) the length of time for which the one employed is engaged; (7) the method of payment, whether by the time or by the job; (8) whether the work is a part of the regular business of the employer; (9) whether the parties believe they are creating an agency relationship; and (10) whether the employer is or is not in business. *Id.* See, also, *Erspamer Advertising Co. v. Dept. of Labor*, 214 Neb. 68, 333 N.W.2d 646 (1983).

With regard to those factors, it is clear that OPPD was an independent contractor. OPPD admits that employees of U S West generally had no right or authority to control the manner in which OPPD's representatives, including Fitzpatrick, performed repairs or services within the cable vault. OPPD admits that on the date of the incident, no employee of U S West made any attempt to control the manner in which OPPD's representatives performed services or repairs within the cable vault. OPPD was the sole possessor and in exclusive control of the cable vault. No representatives of U S West were consulted on the decision to use an uninsulated jumper cable or on the decision to not deenergize circuit No. 27. OPPD was being paid $1,067.90 for the disconnection and reconnection of electrical service to the building. Thus, OPPD was the independent contractor of its employer, U S West.

THEORIES OF RECOVERY

Having concluded that OPPD was U S West's independent contractor, we now move on to Fitzpatrick's proposed theories of recovery. Fitzpatrick states that "this action was brought under the dangerous instrumentality rule whereunder liability may be imposed on the employer of an independent contractor whose negligence causes injury." Brief for appellant at 2.

NEGLIGENCE

For actionable negligence to exist, there must be a legal duty on the part of the defendant to protect the plaintiff from injury, a failure to discharge that duty, and damage proximately resulting from the undischarged duty. *Schmidt v. Omaha Pub.*

Power Dist., 245 Neb. 776, 515 N.W.2d 756 (1994).

> " 'Duty' is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff; and in negligence cases, the duty is always the same—to conform to the legal standard of reasonable conduct in the light of the apparent risk. . . .
>
> "A duty, in negligence cases, may be defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another."

Id. at 786, 515 N.W.2d at 763.

The question of whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation. *Id.* Thus, the core issue of this appeal, given the facts as contained in the pleadings, depositions, admissions, stipulations, and affidavits in the record, is whether U S West owed a duty to Fitzpatrick.

Fitzpatrick acknowledges the general rule with regard to the liability of an employer of an independent contractor: "[T]he employer of an independent contractor is not liable for physical harm caused to another by the acts or omissions of the contractor or his servants." *Erickson v. Monarch Indus.*, 216 Neb. 875, 879, 347 N.W.2d 99, 105 (1984). See, also, *Parrish v. Omaha Pub. Power Dist.*, 242 Neb. 783, 496 N.W.2d 902 (1993). However, Fitzpatrick asserts that U S West should be held liable under an exception to the general rule. We have stated that the employer of an independent contractor may be liable (1) if the employer retains control over the contractor's work or (2) if, by rule of law or statute, the employer has a nondelegable duty to protect another from harm caused by the contractor. *Id.* As a result of a nondelegable duty, the responsibility or ultimate liability for proper performance of a duty cannot be delegated, although actual performance of the task required by a nondelegable duty may be done by another. *Foltz v. Northwestern Bell Tel. Co.*, 221 Neb. 201, 376 N.W.2d 301 (1985).

Fitzpatrick argues that there are five common-law doctrines which impose nondelegable duties upon U S West as the employer of an independent contractor. As Fitzpatrick

describes them, the doctrines are (1) a duty to provide for the taking of precautions against dangerous conditions involved in work entrusted to a contractor, as described in the Restatement (Second) of Torts § 413 (1965); (2) a duty to take "special precautions" against recognizable peculiar risks of physical harm, described more fully in the Restatement, *supra*, § 416; (3) from the Restatement, *supra*, § 427, the rule that the employer of an independent contractor is liable for the negligence of the contractor in doing work which is inherently dangerous; (4) from *McKinstry v. County of Cass*, 228 Neb. 733, 424 N.W.2d 322 (1988); *Foltz v. Northwestern Bell Tel. Co.*, *supra*; and *Erickson v. Monarch Indus.*, *supra*, a nondelegable duty to use due care to protect persons against injury from the hazards or risks which inhere in the work to be undertaken; and (5) from the Restatement (Second) of Torts §§ 519 and 520 (1977), the rule that one who carries on an abnormally dangerous activity is strictly liable for harm resulting from the activity, although the utmost care has been taken to prevent the harm.

We will first discuss the first four asserted bases for the existence of a nondelegable duty. The fifth and last asserted basis will be discussed below in the subsection entitled "Strict Liability."

A careful review of the law cited by Fitzpatrick reveals that she is concentrating on U S West's position as the employer of an independent contractor to the exclusion of another pertinent fact—that the employer in this case has no authority over the independent contractor, which is a public utility. The existence of the employer-independent contractor relationship alone is insufficient to establish a duty owed by U S West to Fitzpatrick given the unique fact that U S West could not exercise any control over the operations of OPPD. Fitzpatrick has not cited any cases, and we have been unable to find any, in which the employer of an independent contractor was held liable for the negligence of the independent contractor where the employer could not exercise any authority over the operations of the independent contractor.

However, in *Green v. Duke Power Co.*, 305 N.C. 603, 290 S.E.2d 593 (1982), the Supreme Court of North Carolina held

that neither the owner nor the occupier of land upon which a power company had placed a transformer pursuant to an easement had a duty to make the transformer safe for children playing in the vicinity because the landowner had no control over the transformer or authority over the power company. In support of its holding, the court in *Green* stated:

> In instant case, neither the owner nor the occupier of the property . . . had the right to deny access to the transformer or to remedy the dangerous condition of the device. The transformer was the sole property of appellant Duke Power. It was placed on the premises pursuant to a valid easement . . . . Any interference or tampering with Duke's transformer would clearly encroach upon the rights granted to Duke by the easement. Likewise, locking or fencing the transformer would impair Duke's access to it and would be inconsistent with the terms of the easement. It was not reasonably practical for the owner of the realty . . . or the occupier . . . to prevent access to the transformer or to render it harmless.

Id. at 611, 290 S.E.2d at 598.

In another similar case, *Mark v. Pacific Gas and Electric Company*, 7 Cal. 3d 170, 496 P.2d 1276, 101 Cal. Rptr. 908 (1972), the Supreme Court of California held that a landlord breached no duty of care owed to a college student who was electrocuted while attempting to remove a light bulb from a street lamp located outside his bedroom window, in view of the fact that the landlord possessed no control or authority over the street lamp.

Absence of control over the utility was the determinative issue in the two cases above. In the case at hand, U S West did not and could not exercise any control over how OPPD conducted its operations. OPPD has stated that employees of U S West had no right or authority to control the manner in which OPPD's representatives, including Fitzpatrick, performed repairs or services within the cable vault. OPPD stated that on the date of the incident, no employee of U S West made any attempt to control the manner in which OPPD's representatives performed services or repairs within the cable vault. OPPD was

the sole possessor and in exclusive control of the cable vault. No representatives of U S West were consulted on the decision to use an uninsulated jumper cable or on the decision to not deenergize circuit No. 27.

It is important to note that U S West *could not* control OPPD's operations. This is not a case where U S West relinquished control or refused to exercise control it possessed. It simply had none. It would be futile to impose a duty to prevent harm upon one who has neither the opportunity nor the ability to reduce the risk of harm. Under these facts, as a matter of law, U S West had no legal duty to protect Fitzpatrick from the hazard of an explosion and fire in the underground cable vault.

STRICT LIABILITY

There is an inherent inconsistency with respect to Fitzpatrick's last urged common-law basis for U S West's having a nondelegable duty. The following is Fitzpatrick's stated theory of recovery: "[T]his action was brought under the dangerous instrumentality rule whereunder liability may be imposed on the employer of an independent contractor whose negligence causes injury." Brief for appellant at 2. Clearly, Fitzpatrick's theory is based on negligence principles. However, she relies upon §§ 519 and 520 of the Restatement, *supra*, to establish a common-law basis for the existence of a nondelegable duty. Those sections of the Restatement concern strict liability. Strict liability is a doctrine that imposes liability without regard to breach of a duty. W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 75 (5th ed. 1984). To hold U S West strictly liable for the harm caused Fitzpatrick, it would be unnecessary to establish that U S West owed her a nondelegable duty. Thus, those sections of the Restatement are inconsistent with and irrelevant to Fitzpatrick's stated theory of recovery.

Even if we give Fitzpatrick the benefit of the doubt and presume that she wished to state an alternative theory of recovery based upon principles of strict liability, her claim must fail. Fitzpatrick would have us hold that reconnecting electricity to a building is an ultrahazardous activity. The

activity being an ultrahazardous one, Fitzpatrick would then hold the owner of the building strictly liable for any harm proximately caused by its performance. We decline to do so. Fitzpatrick cites no authority in support of her position, and as far as we can determine, such a holding would be unprecedented. According to Prosser and Keeton in their oft-cited treatise on tort law, strict liability has been applied to the following "abnormally dangerous" or ultrahazardous activities, the terms generally being considered synonymous:

> water collected in quantity in a dangerous place, or allowed to percolate; explosives or inflammable liquids stored in quantity in the midst of a city; blasting; pile driving; crop dusting; the fumigation of part of a building with cyanide gas; drilling oil wells or operating refineries in thickly settled communities; an excavation letting in the sea; factories emitting smoke, dust or noxious gases in the midst of a town; roofs so constructed as to shed snow into a highway; and a dangerous party wall.

Id. at 549-50.

Things and activities not considered abnormally dangerous or ultrahazardous include:

> water in household pipes, the tank of a humidity system, or authorized utility mains; gas in a meter, electric wiring in a machine shop, and gasoline in a filling station; a dam in the natural bed of a stream; ordinary steam boilers; an ordinary fire in a factory; an automobile; Bermuda grass on a railroad right of way; a small quantity of dynamite kept for sale in a Texas hardware store; barnyard spray in a farmhouse; a division fence; the wall of a house left standing after a fire; coal mining operations regarded as usual and normal; vibrations from ordinary building construction; earth moving operations in grading a hillside; the construction of a railroad tunnel; and even a runaway horse.

Id. at 550-51.

Additionally, there is no basis in reason or logic for such a holding. Building owners and homeowners have no direct authority over how a public utility conducts its operations, even, as here, where the operations concern the owner's own

piece of property. It is best that building owners and homeowners have no direct authority, as employees of a public utility will presumably almost always be better qualified to determine how an operation should be conducted and what safety precautions should be taken. Absent negligence, we do not even hold power companies engaged in the transmission of high voltage electricity liable for the harm caused those who inadvertently come into contact with electrical lines. *Engleman v. Nebraska Public Power Dist.*, 228 Neb. 788, 424 N.W.2d 596 (1988). See, also, *Lorence v. Omaha P. P. Dist.*, 191 Neb. 68, 214 N.W.2d 238 (1974); *Gillotte v. Omaha Public Power Dist.*, 185 Neb. 296, 176 N.W.2d 24 (1970). We, therefore, refuse to rule as a matter of law that the connection of electricity to a building is an abnormally dangerous or ultrahazardous activity. Thus, U S West could not be held strictly liable for the harm caused Fitzpatrick.

CONCLUSION

In this appeal from the district court's order granting U S West summary judgment, Fitzpatrick did not assert that there was a genuine issue of material fact to prevent summary judgment. Rather, she essentially argued that under the facts presented, U S West was not entitled to judgment as a matter of law. She contended that U S West as the employer of an independent contractor owed her a number of nondelegable duties which U S West breached. However, U S West, even as the employer of an independent contractor, could not control or have any authority over the operations conducted by its independent contractor, OPPD, a public utility. We determine that under the facts presented, U S West, as a matter of law, had no legal duty to protect Fitzpatrick from the hazard of an explosion and fire in the underground cable vault. Neither does the doctrine of strict liability impose liability on U S West. There being no genuine issue of material fact, we find that the grant of summary judgment by the district court was appropriate, and we affirm that court's decision.

AFFIRMED.

JANIS L. ERICHSEN, APPELLANT, V. NO-FRILLS SUPERMARKETS OF OMAHA, INC., A NEBRASKA CORPORATION, AND HAROLD COOPERMAN, AN INDIVIDUAL, APPELLEES.

518 N.W.2d 116

Filed July 1, 1994. No. S-92-1119.

1. **Demurrer: Pleadings: Appeal and Error.** When reviewing an order sustaining a demurrer, an appellate court accepts the truth of facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but it does not accept as true the conclusions of the pleader.
2. **Negligence.** For actionable negligence to exist, there must be a legal duty on the part of the defendant to protect the plaintiff from injury, a failure to discharge that duty, and damage proximately resulting from such undischarged duty.
3. _____. "Duty" is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff, and in negligence cases, the duty is always the same—to conform to the legal standard of reasonable conduct in the light of the apparent risk.
4. **Negligence: Words and Phrases.** A duty, in negligence cases, may be defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.
5. **Invitor-Invitee: Negligence.** An allegation of many occasions of similar criminal activity in one fairly contiguous area in a limited timespan may make further such acts reasonably foreseeable so as to create a duty to a business invitee.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Reversed and remanded for further proceedings.

Robert C. Guinan, of Guinan & Scott, and Kirk L. Meisinger, of Meisinger & Spindler, for appellant.

John R. Douglas, of Cassem, Tierney, Adams, Gotch & Douglas, for appellees.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ.

LANPHIER, J.

This appeal arises out of a personal injury action. Janis L. Erichsen, appellant, a customer of appellee No-Frills Supermarkets of Omaha, Inc. (No-Frills), sustained injuries as a result of being dragged by a car during an attempted purse-snatching in No-Frills' parking lot. Appellee Harold Cooperman owns the shopping center. Appellant sought

recovery from appellees for negligently failing to warn her of prior criminal activity which occurred on "at least ten occasions" in or about the parking lot or for failing to protect her from criminal activities which were allegedly foreseeable because of such prior criminal activity. The district court sustained appellees' demurrers, finding that neither appellee owed a duty to appellant.

STATEMENT OF FACTS

In her third amended petition, appellant alleged that on July 28, 1991, at 6 a.m., she went shopping at No-Frills located in Cooperman's shopping center, known as Harold's Square Shopping Center, at 8005 Blondo Street in Omaha and parked her vehicle in No-Frills' parking lot area. While returning to her vehicle, she was assaulted, beaten, and robbed of her purse by at least one assailant. In the course of the assault and robbery, appellant, who was outside the assailant's vehicle, became entangled in the safety belt or seat of the vehicle. As a result, appellant was dragged on the pavement for approximately 1.6 miles and severely injured.

Appellant claimed that on at least 10 occasions within a 16-month period prior to the assault on appellant, similar crimes, including theft, purse-snatching, and robbery, had been committed in the No-Frills parking lot or in surrounding premises and parking lot. Appellant further alleged that appellees knew or should have known that under the foregoing circumstances, their practice of maintaining fewer employees to assist customers to their vehicles increased the risk of criminal activity against appellees' customers. Appellant claimed that appellees had a duty to foresee the type of criminal activity of which appellant was a victim and to take steps to guard her against the harm or at least warn her of the risk. Appellees demurred, stating that the facts pled were insufficient to state a cause of action. The district court sustained the demurrer.

Appellant's sole assignment of error asserts that the district court erred in sustaining the demurrer of appellees on the grounds that appellees did not owe appellant a duty of due care.

STANDARD OF REVIEW

When reviewing an order sustaining a demurrer, an appellate

court accepts the truth of facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but it does not accept as true the conclusions of the pleader. *Durand v. Western Surety Co.*, 245 Neb. 649, 514 N.W.2d 840 (1994).

NEGLIGENCE

For actionable negligence to exist, there must be a legal duty on the part of the defendant to protect the plaintiff from injury, a failure to discharge that duty, and damage proximately resulting from such undischarged duty. *Schmidt v. Omaha Pub. Power Dist.*, 245 Neb. 776, 515 N.W.2d 756 (1994). "Duty" is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff, and in negligence cases, the duty is always the same—to conform to the legal standard of reasonable conduct in the light of the apparent risk. *Id.* A duty, in negligence cases, may be defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another. *Id.* Foreseeability is a factor in establishing a defendant's duty. *Id.*

RESTATEMENT (SECOND) OF TORTS

We have adopted the rule regarding landlord liability to business invitees, as set forth in Restatement (Second) of Torts § 344 (1965). See, *C.S. v. Sophir*, 220 Neb. 51, 368 N.W.2d 444 (1985); *Harvey v. Van Aelstyn*, 211 Neb. 607, 319 N.W.2d 725 (1982); *Hughes v. Coniglio*, 147 Neb. 829, 25 N.W.2d 405 (1946). The Restatement, *supra*, at 223-24 provides:

> A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to (a) discover that such acts are being done or are likely to be done, or (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.

Comment *f.* to § 344 makes it clear that the owner of the property is not an insurer of the land or the visitor's safety while

on it. However, liability will be found under certain circumstances:

> Since the possessor is not an insurer of the visitor's safety, he is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of the third person are occurring, or are about to occur. *He may, however, know or have reason to know, from past experience, that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor, even though he has no reason to expect it on the part of any particular individual.* If the place or character of his business, or his past experience, is such that he should reasonably anticipate careless or criminal conduct on the part of third persons, *either generally* or at some particular time, he may be under a duty to take precautions against it, and to provide a reasonably sufficient number of servants to afford reasonable protection.

(Emphasis supplied.) *Id.* at 225-26.

NEBRASKA PREMISES LIABILITY

We have interpreted the Restatement and have held that a landlord is under a duty to exercise reasonable care to protect his patrons. Such care may require giving a warning or providing greater protection where there is a *likelihood* that third persons will endanger the safety of the visitors. *C.S. v. Sophir, supra.*

We have applied these principles in several cases. In *Harvey v. Van Aelstyn, supra*, we held that no liability attached to the owner of a bar where the appellant, a patron, was assaulted by a third party while in the bar. The assailant had not been present in the bar, but had entered the bar suddenly, went straight for the appellant, and struck him. The assailant had been violent in the establishment on *one* prior occasion a year or more prior to the incident at issue. We stated that the possessor of the premises was not bound to anticipate the unforeseeable independent acts of third persons, nor did she have a duty to take precautionary measures to protect against such acts, because those acts could not be reasonably anticipated.

In *Harvey*, we cited several cases in reaching this conclusion. One case, *Hughes v. Coniglio*, 147 Neb. 829, 25 N.W.2d 405 (1946), denied recovery against a restaurant owner where a patron suffered injuries from an assault by another patron. This court noted that there was no history of any fights in the establishment and that the assault occurred suddenly and unexpectedly where no precautionary measures would have prevented the assault.

In *C.S. v. Sophir, supra*, the plaintiff, a tenant in the defendant landlord's apartment complex, was sexually assaulted. There had been one prior assault in the complex. We held that it would be unfair to impose liability upon a landlord based on a *single* prior assault at the complex. This court noted that other jurisdictions that had imposed liability upon a landlord under similar circumstances had done so only where there was a "history of criminal activity at the leased premises sufficient to create in the landlord constructive notice of the foreseeability that such activity would recur in the future." 220 Neb. at 53-54, 368 N.W.2d at 447.

The most recent case involving landlord liability for the acts of third persons is *K.S.R. v. Novak & Sons, Inc.*, 225 Neb. 498, 406 N.W.2d 636 (1987). In *K.S.R.*, the appellant was sexually assaulted in the apartment complex owned by the appellee. The assailant had been seen by the building manager several times near the complex exhibiting inappropriate sexual behavior in public. This court reaffirmed the holdings of the prior cases involving the same issue by stating that "a landlord is not an insurer of a tenant's safety. However, a landlord has a duty to protect a tenant against the foreseeable criminal acts of a third person." *Id.* at 500, 406 N.W.2d at 638.

In *K.S.R.*, we held that unlike *Sophir*, there was a history of criminal activity on the premises, and therefore the assault perpetrated against the appellant was foreseeable. In finding that liability could be imposed against a landlord for reasonably foreseeable criminal acts of third parties, this court cited *Waters v. New York City Housing Authority*, 69 N.Y.2d 225, 505 N.E.2d 922, 513 N.Y.S.2d 356 (1987), and quoted:

> "It is also now beyond dispute that a landlord, private or public, may have a duty to take reasonable precautionary

> measures to secure the premises if it has notice of a likelihood of criminal intrusions posing a threat to safety [citations omitted]. . . . [A] building owner who breaches such a duty may be held liable to an individual who is injured in a reasonably foreseeable criminal encounter that was proximately caused by the absence of adequate security [citations omitted]."

225 Neb. at 500-01, 406 N.W.2d at 638.

This court has denied relief where the appellant based his or her allegations of negligence on a single act of violence. In those cases, we held that one incident did not, under the facts presented in those cases, constitute sufficient notice to make the criminal acts sued upon reasonably foreseeable. See, *C.S. v. Sophir*, 220 Neb. 51, 368 N.W.2d 444 (1985); *Harvey v. Van Aelstyn*, 211 Neb. 607, 319 N.W.2d 725 (1982); *Hughes v. Coniglio, supra*. However, as *K.S.R.* demonstrates, a duty to undertake reasonable precautionary measures will be imposed on the landlord when there is a sufficient amount of criminal activity to make further criminal acts reasonably foreseeable. The question is one of foreseeability. The trial court was in error in determining that the prior criminal activity must all involve the same suspect to make further criminal acts reasonably foreseeable. In *K.S.R.*, the prior criminal activity did involve the same suspect. However, this is not a required element of the foreseeability of further criminal acts. Under our standard of review, the allegation of many occasions of "similar" criminal activity in one fairly contiguous area in a limited timespan may make further such acts sufficiently foreseeable to create a duty to a business invitee.

We find that appellant has pled sufficient facts which, if accepted as true (as we are required to do under applicable law), are legally sufficient to support appellant's assertion that appellees owed her a duty of reasonable care which they breached. Appellant alleged that

> [o]n at least ten occasions within the sixteen month period preceding July 28, 1991 [the date of the attack upon the appellant], criminal activity of a nature similar to that involved in this action occurred in the No-Frills parking area or upon the surrounding premises and parking lot.

> Included within the criminal activities were thefts, a purse snatching, and robbery . . . . At least some of the criminal activity prior to July 28, 1991, including the purse snatching, took place on the No-Frills parking area and involved invitees of No-Frills as victims of the criminal activity.

Appellant also alleged that appellees knew or should have known that absent adequate security, criminal activity was likely to take place within the No-Frills parking area.

Although appellant concedes that not all of the criminal activities took place in the No-Frills parking lot, she did allege that at least some of the incidents of criminal activity, including a purse-snatching, actually took place on the area of the parking lot assigned to No-Frills. Criminal acts that occur near the premises in question give notice of the risk that crime may travel to the premises of the business owner. *Murrow v. Daniels*, 321 N.C. 494, 364 S.E.2d 392 (1988); *Brown v. J. C. Penney Co.*, 297 Or. 695, 688 P.2d 811 (1984); *Virginia D. v. Madesco Inv. Corp.*, 648 S.W.2d 881 (Mo. 1983). Accordingly, the district court erred in sustaining the demurrer.

We do not now determine what specific measures business possessors must employ to protect business invitees. Rather, we continue to hold that a business possessor must exercise reasonable care to keep the premises safe for its business invitees. See, *Anderson v. Service Merchandise Co.*, 240 Neb. 873, 485 N.W.2d 170 (1992); *Kliewer v. Wall Constr. Co.*, 229 Neb. 867, 429 N.W.2d 373 (1988); *Havlicek v. Desai*, 225 Neb. 222, 403 N.W.2d 386 (1987). Whether particular measures discharge a business owner's duty to exercise reasonable care is decided in hindsight with the benefit of knowledge. See *id.* Speculating on the cost of given measures in light of their relative benefit is not within the province of this court. See, *Anderson v. Service Merchandise Co., supra* (we did not speculate as to how a light is properly hung); *Havlicek v. Desai, supra* (we did not speculate on how many lumens would be sufficient to light the stairway); *Nownes v. Hillside Lounge, Inc.*, 179 Neb. 157, 137 N.W.2d 361 (1965) (we did not speculate on how a barstool should be fastened to the floor).

CONCLUSION

We find that appellant has alleged sufficient facts in her petition to overcome the demurrer of appellees. The cause is therefore remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

FAHRNBRUCH, J., dissenting.

I respectfully dissent from the majority's opinion, which, in effect, holds that a business owner who is aware of prior criminal activity in the immediate vicinity of the owner's place of business is under a duty to either warn potential customers of the criminal activity or to provide security to business invitees.

The majority extends this state's doctrine of what it characterizes as "premises liability" far beyond any of this court's previous holdings. This court has previously considered pure premises liability to arise out of a defect or condition of the premises, rather than from the acts of third parties. See, e.g., *Ellis v. Far-Mar-Co*, 215 Neb. 736, 340 N.W.2d 423 (1983) (holding that accident which occurred when employees failed to move grain cars in reasonable manner was not a case of premises liability). However, in the present case, the majority is willing to impose "premises liability" upon a defendant for the independent and random criminal acts of a third party.

Citing Restatement (Second) of Torts § 344 (1965), the majority has found that Erichsen's allegation of 10 incidents of criminal activity in the vicinity of the No-Frills parking lot during the previous 16 months is sufficient to raise a factual question whether the attack on Erichsen was foreseeable by No-Frills.

The issue of foreseeability was discussed by the District of Columbia Court of Appeals in *Cook v. Safeway Stores, Inc.*, 354 A.2d 507 (D.C. App. 1976), a case with facts strikingly similar to the one before us. In *Cook*, a customer at a grocery store attempted to restrain a man who had taken her wallet from her shopping cart. When the customer grabbed the man's arm, the man struck her in the face with his fist and ran from the store. The customer sued Safeway to recover for her personal injuries sustained in the incident.

Plaintiff's counsel argued that the store was located in a high-crime area, that similar incidents had occurred there and in the adjacent streets, that assaults on customers were foreseeable by store management, and that the store had a duty to provide guard service. The trial court directed a verdict in favor of Safeway after plaintiff's opening statement, holding that plaintiff had not stated a cause of action.

The District of Columbia Court of Appeals affirmed the order of the trial court. That court noted that crime was foreseeable, but held that the act of the customer in attempting to physically restrain a purse-snatcher was not one which the storekeeper could anticipate, and thus, the events leading to the customer's injury were not foreseeable by Safeway.

Quoting *Goldberg v. Housing Auth. of Newark*, 38 N.J. 578, 186 A.2d 291 (1962), the court stated:

> "Everyone can foresee the commission of crime virtually anywhere and at any time. If foreseeability itself gave rise to a duty to provide 'police' protection for others, every residential curtilage, every shop, every store, every manufacturing plant would have to be patrolled by the private arms of the owner. And since hijacking and attack upon occupants of motor vehicles are also foreseeable, it would be the duty of every motorist to provide armed protection for his passengers and the property of others. Of course, none of this is at all palatable.
>
> "The question is not simply whether a criminal event is foreseeable, but whether a *duty* exists to take measures to guard against it. . . ."

Cook, 354 A.2d at 509-10.

Similarly, while a purse-snatching in the No-Frills parking lot is certainly foreseeable by both No-Frills *and* Erichsen, it is utterly unforeseeable by No-Frills that a purse-snatching victim in the parking lot would somehow become entangled in the seatbelt of her assailant's automobile and be dragged 1.6 miles. By its holding that "many" occasions of " 'similar' " criminal activity in an area may be sufficient to make further criminal acts foreseeable, the majority has done no more than state the obvious and has created a broad category of civil liability for business owners in Nebraska. I would adopt a more narrow

analysis and hold that Erichsen's petition failed to state a cause of action because No-Frills could not possibly have foreseen the bizarre events leading to Erichsen's injuries.

Having determined that criminal acts in its parking lot were foreseeable by No-Frills, the majority concludes that Erichsen has pled sufficient facts to impose some amorphous duty of reasonable care upon No-Frills. However, the majority declines to determine in what way No-Frills might have met its duty to Erichsen, stating that "[s]peculating on the cost of given measures in light of their relative benefit is not within the province of this court." If the majority is unwilling or unable to more clearly define the duty of a business owner to customers, the matter should be left to the Legislature and not to speculation of the business owner.

Although in some cases it may be inappropriate for the court to speculate on how a defendant may meet a duty, the cases cited by the majority do not support this proposition. In none of the three cases cited by the court was the issue of duty before the court. Both *Anderson v. Service Merchandise Co.*, 240 Neb. 873, 485 N.W.2d 170 (1992), and *Nownes v. Hillside Lounge, Inc.*, 179 Neb. 157, 137 N.W.2d 361 (1965), dealt with the issue of whether the instrumentality of harm was within the exclusive control of the defendant for purposes of res ipsa loquitur. In *Havlicek v. Desai*, 225 Neb. 222, 403 N.W.2d 386 (1987), the defendant acknowledged that he had a duty to keep his business premises safe for the plaintiff's use. Therefore, it was not necessary in any of the three cases for the court to speculate on the extent of the defendant business owners' duties.

On the other hand, this court has in some cases defined the duty which it imposed upon a defendant. See, e.g., *Schmidt v. Omaha Pub. Power Dist.*, 245 Neb. 776, 515 N.W.2d 756 (1994) (holding that defendant underground utility clearinghouse had duty to warn callers that only equipment owned by member utilities would be located and to specifically warn that secondary electric lines in a commercial setting would not be located by the member electric company).

By offering no guidance as to how such business owners may conduct their businesses within the bounds of the law, the majority imposes an unreasonable burden upon business

owners. Because the majority refuses to speculate, it is now well-intentioned business owners who are left to speculate as to what duty is owed to customers or prospective customers in the store parking lot. Thus, the majority has set the classic "trap for the unwary," for only when the litigation trap is sprung will the business owner finally learn the extent of the duty owed.

According to Restatement (Second) of Torts § 344 (1965), a business may meet its duty to its customers by either giving an adequate warning or providing protection. To hold that a business owner has a duty to warn of potential criminal activity in the vicinity of the owner's business is to require the owner to warn of the obvious: The world is a dangerous place. Random acts of crime and violence against the person are rampant in today's society and are of epidemic proportions. This is common knowledge and is sufficient to put everyone on notice that a person can be mugged any time, any place. I would find a warning in such a situation to be a futile and unreasonable requirement.

The alternative to warning invitees is for business owners to "provide protection." Presumably, this means that the business is required to hire security guards for the premises.

Even with all of modern technology, the existence of armed police does not prevent crime and violence in society at large, for an obvious reason: The police cannot be in all places at all times. Similarly, armed security officers are unable to prevent crime and violence in the microcosm of a parking lot. Security officers themselves have been the victims of violent crime while on duty. See, e.g., *State v. Brock*, 245 Neb. 315, 512 N.W.2d 389 (1994) (security officer shot while attempting to apprehend shoplifter). Moreover, security officers are ordinarily hired for the purpose of protecting the business itself against criminal activity, and any benefit to customers is incidental thereto.

There is no duty on the part of an invitor owner to protect, or to warn, an invitee against hazards which are known to the invitee or are so apparent that he may reasonably be expected to discover them and protect himself. *Bruyninga v. Nuss*, 216 Neb. 801, 346 N.W.2d 245 (1984). Because I would find that the hazard of random criminal activity is as well known to customers such as Erichsen as it is to businesses such as

No-Frills, I would hold that No-Frills had no duty to either warn or protect Erichsen.

Finally, while recognizing that the owner of property is not an insurer of the owner's land or the visitor's safety in a parking lot, the majority has, in fact, made business owners the insurers of the safety of invitees. The economic impact of such duties is certain to be especially disastrous to low-profit-margin businesses. The grocery business comes to mind.

Must the business owner erect a billboard in the owner's parking lot to advise potential customers of the perils of possible victimhood to which they may fall prey should they decide to exit their vehicles? Yes, according to the Restatement, *supra* at comment *g*. at 226 (rule applies "not only to make it the possessor's duty to protect his visitors after they have entered the land, but also *to warn them before their entry of any acts or threatened acts of third persons which may endanger them if they enter*" (emphasis supplied)). Once such a billboard is in place, will potential customers ever become actual customers? It seems unlikely that any business could survive such a "warning." The rule is unrealistic in today's world.

Additionally, the provision of a full panoply of security personnel is inconsistent with the basic premise of "no-frills" or discount retail operations; that is, the business saves money by providing less service but passes along this saving to the customer in the form of lower prices. To the extent that the courts impose a duty upon these establishments to hire additional personnel, they contribute to the economic demise of such businesses.

Moreover, I cannot imagine any insurance company in the world which would be willing to insure a business against intentional criminal acts of third parties directed at actual or potential customers of that business. The entire burden of this uninsurable risk thus falls upon the business owner.

For the reasons discussed above, I disagree with the majority that the events leading to Erichsen's injury were foreseeable, and I find the potential amorphous duties on business owners inherent in the majority's opinion to be both unreasonable and economically disastrous. I would affirm the order of the district court sustaining the defendants' demurrers.

RYDER TRUCK RENTAL, INC., APPELLANT, V. HELEN ROLLINS AND JOHN H. CROM, APPELLEES.

518 N.W.2d 124

Filed July 1, 1994. No. S-92-1134.

1. **Declaratory Judgments.** In any case where declaratory relief is sought, there must be present an actual controversy.
2. _____. An action for a declaratory judgment cannot be used to decide the legal effect of a state of facts which are future, contingent, or uncertain; there must, at the time that the declaration is sought, be an actual justiciable issue.
3. _____. Declaratory relief cannot be used to obtain a judgment which is merely advisory.
4. **Declaratory Judgments: Torts.** A declaratory judgment action should not be entertained when it is initiated by a prospective tort defendant.
5. **Declaratory Judgments.** The function of a declaratory judgment is to determine justiciable controversies which either are not yet ripe for adjudication by conventional forms of remedy or, for other reasons, are not conveniently amenable to the usual remedies.
6. _____. Declaratory judgment does not lie where another equally serviceable remedy is available.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Reversed and remanded with direction to dismiss.

Leif D. Erickson, of Cassem, Tierney, Adams, Gotch & Douglas, for appellant.

Wadie Thomas, Jr., and Lavon Stennis for appellee Rollins.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ.

CAPORALE, J.

In this declaratory judgment action, the district court held that as the owner of the van-type vehicle the plaintiff-appellant, Ryder Truck Rental, Inc., rented to the defendant-appellee John H. Crom, Ryder is jointly and severally liable with Crom for any damages sustained by the defendant-appellee Helen Rollins, arising from the collision between the vehicle she was operating and the van Crom was operating. Claiming error in that ruling, Ryder appealed to the Nebraska Court of Appeals; we, on our own motion, removed the case to this court in order to regulate the caseloads of the two courts. We now reverse the

judgment of the district court and remand the cause with the direction that it be dismissed.

On September 1, 1991, Crom entered into a written "Rental Agreement" with Ryder at Hinesville, Georgia, for a day of local use of the van. The relevant provisions of the agreement gave Ryder the right to terminate the agreement at any time and provided that Crom's failure to return the vehicle at the designated destination within 3 days of the specified time constituted an unauthorized taking, in which event Ryder could consider the vehicle stolen and issue theft notices and warrants for Crom's arrest and take such other steps as Ryder might deem reasonable. In addition, Crom agreed not to permit the vehicle to be used in violation of any law or to be operated in a reckless or abusive manner.

Crom did not return the vehicle at the scheduled time, and it was reported stolen to the Hinesville Police Department. An Omaha police officer later came upon Crom in a restricted area and told him to leave. Afterward, the officer determined that the vehicle Crom was driving, or the registration plate it bore, had been reported stolen. When the officer attempted to stop the departing van, Crom accelerated, and a chase ensued. At some point, Crom stopped the van, and when the police cruiser approached him, Crom put the van into reverse and rammed the cruiser. Crom continued to flee and during the continuing police chase struck the automobile Rollins was operating. Crom ultimately pled guilty to theft of the van and other charges.

Ryder subsequently filed this action, asking the district court to construe the agreement and to find that Crom stole the van and was operating it in violation of the agreement, that Crom operated the van in a reckless and abusive manner in violation of Nebraska's motor vehicle statutes, that the agreement is a Georgia contract which should be construed and interpreted in accordance with the laws of that state, and that Ryder has no vicarious liability to Rollins under the provisions of Neb. Rev. Stat. § 39-6,193 (Reissue 1988) or otherwise.

In general, § 39-6,193 makes the owner of certain types of vehicles leased to others jointly and severally liable with the lessee and the operator for damage occasioned by operation of

the vehicle in Nebraska. Although Ryder alleges that Rollins asserted a claim against it for damages arising out of the collision, Rollins denies that she has done so. We neither find nor are we pointed to any evidence in this regard.

Our first task is to determine whether a declaratory judgment action may or should be used as a means by which a prospective defendant may obtain a declaration of nonliability. In essence, we must determine whether the trial court abused its discretion in exercising its jurisdiction in this matter.

Neb. Rev. Stat. § 25-21,149 (Cum. Supp. 1992) provides that the courts

> shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect, and such declarations shall have the force and effect of a final judgment or decree.

In addition, Neb. Rev. Stat. § 25-21,151 (Reissue 1989) permits a contract to be construed either before or after there has been a breach thereof.

We have previously addressed an issue similar to the one now before us in *Allstate Ins. Co. v. Novak*, 210 Neb. 184, 313 N.W.2d 636 (1981). The insureds therein appealed from a declaratory judgment entered by the district court holding that the insurance company was not obligated to defend the insureds or to pay any judgment rendered against them under the terms of a policy of insurance issued by Allstate to the insureds. While this court found that the insurance company had a duty to defend the insureds, it refused to grant declaratory judgment as to the carrier's obligation to pay. Noting that the existence of a controversy is required to maintain an action for a declaratory judgment, we held that such an action could not be used to "decide the legal effect of a state of facts which are future, contingent, or uncertain." *Id.* at 188, 313 N.W.2d at 638. We therefore ruled that until it was determined that the insured was legally obligated to pay the injured party, the question of the insurer's obligation was uncertain and contingent. However,

citing two earlier cases, we recognized that there might be appropriate circumstances wherein a carrier's obligation to pay could be determined prior to a determination of an insured's liability.

Although this case does not involve an insurer, and we need not here explore the circumstances under which an insurer may obtain a declaration of its rights, *Allstate Ins. Co.*'s holding is relevant in that it clearly requires the existence of an actual controversy as a prerequisite to declaratory relief. See, *Boyles v. Hausmann, ante* p. 181, 517 N.W.2d 610 (1994); *Jaksha v. State*, 241 Neb. 106, 486 N.W.2d 858 (1992); *Koenig v. Southeast Community College*, 231 Neb. 923, 438 N.W.2d 791 (1989); *Mullendore v. Nuernberger*, 230 Neb. 921, 434 N.W.2d 511 (1989).

A court should refuse a declaratory judgment unless the pleadings present a justiciable controversy which is ripe for judicial determination. See *Skowron v. Skowron*, 259 Wis. 17, 47 N.W.2d 326 (1951). Therefore, an action for a declaratory judgment cannot be used to decide the legal effect of a state of facts which are future, contingent, or uncertain. *Boyles v. Hausmann, supra*; *Mullendore v. Nuernberger, supra*; *Allstate Ins. Co. v. Novak, supra.*

While it is not necessary that one party have an actual right of action against another to satisfy the jurisdictional requirement of an actual controversy, it is necessary that litigation appear unavoidable. *Gaston Bd. of Realtors v. Harrison*, 311 N.C. 230, 316 S.E.2d 59 (1984); *Consumers Power v. Power Co.*, 285 N.C. 434, 206 S.E.2d 178 (1974); *Stabler, et al., v. Ramsey, et al.*, 32 Del. Ch. 547, 88 A.2d 546 (1952); *Ex parte State*, 241 Ala. 304, 2 So. 2d 765 (1941); *Hicks v. Hicks*, 60 N.C. App. 517, 299 S.E.2d 275 (1983). Mere apprehension or the mere threat of an action or a suit is not enough. *Gaston Bd. of Realtors v. Harrison, supra*; *McKinnon v. Lane*, 285 S.W.2d 269 (Tex. Civ. App. 1955). See *Third Nat. Bank in Nashville v. Carver*, 31 Tenn. App. 520, 218 S.W.2d 66 (1948) (declaratory judgment act does not enable courts to make declaration with regard to claim which complainant merely fears defendant may assert in future). Contra *N.J. Home Builders Ass'n v. Div. on Civil Rights*, 81 N.J. Super.

243, 195 A.2d 318 (1963), *aff'd sub nom. David v. Vesta Co.*, 45 N.J. 301, 212 A.2d 345 (1965) (existence of claim or threat of possible claim disturbing peace of plaintiffs' freedom by casting doubt or uncertainty upon rights or status establishes requisite condition of justiciability for declaratory judgment action). Nor is a declaratory judgment action to be used to adjudicate hypothetical or speculative situations which may never come to pass. *Commonwealth Insurance Agency, Inc. v. Arnold*, 389 S.W.2d 803 (Mo. 1965) (claim against insurance company presents concrete, not hypothetical, situation). The declaratory judgment proceedings do not " 'require the court to give a purely advisory opinion which the parties might, so to speak, put on ice to be used if and when occasion might arise.' " *Gaston Bd. of Realtors v. Harrison*, 311 N.C. at 234, 316 S.E.2d at 62 (quoting *Tryon v. Power Co.*, 222 N.C. 200, 22 S.E.2d 450 (1942)).

Here, Ryder seeks to have a declaration of nonliability before Rollins has sued anyone. We do not know if Rollins will bring suit against Ryder nor in which state such a suit may be brought. Moreover, even if we assume that Rollins will bring suit against Ryder, we still lack the requisite knowledge as to the claims Rollins would assert. She may, for example, assert that Ryder is vicariously liable under § 39-6,193 or through some other theory under the laws of Nebraska or Georgia; or, as discussed by Ryder in its brief, Rollins may instead file suit against the city of Omaha because her injuries were incurred during a police chase. Therefore, the required element of controversy does not exist and may never do so.

Finally, Rollins seeks no damages herein; consequently, this action will not end the controversy. We have previously ruled that a court should enter a declaratory judgment only where such judgment would terminate or resolve the controversy between the parties. *Omaha Pub. Power Dist. v. Nuclear Elec. Ins. Ltd.*, 229 Neb. 740, 428 N.W.2d 895 (1988); *VisionQuest, Inc. v. State*, 222 Neb. 228, 383 N.W.2d 22 (1986); *Beatrice Manor v. Department of Health*, 219 Neb. 141, 362 N.W.2d 45 (1985). See Neb. Rev. Stat. § 25-21,154 (Reissue 1989). The court must make a full and complete declaration, and where it will be necessary to bring another action or proceeding to settle

the controversy, declaratory judgment will not be granted. *Graham v. Beauchamp*, 154 Neb. 889, 50 N.W.2d 104 (1951); *Dobson v. Ocean Accident & Guarantee Corporation*, 124 Neb. 652, 247 N.W. 789 (1933).

This does not, however, mean that the mere filing of a suit would render this case a proper one for declaratory judgment. Neb. Rev. Stat. § 25-21,163 (Reissue 1989) suggests that the statutes dealing with declaratory judgment be interpreted in conformity with the interpretation of other jurisdictions which have like statutes. With that suggestion in mind, we note that federal case law clearly establishes the rule that a declaratory judgment action should not be entertained when it is initiated by a prospective tort defendant. *Cunningham Brothers, Inc. v. Bail*, 407 F.2d 1165 (7th Cir. 1969), *cert. denied* 395 U.S. 959, 89 S. Ct. 2100, 23 L. Ed. 2d 745 (declaratory judgment denied where general contractor sought declaration it did not "have charge of" work being performed by employees of masonry subcontractor who were injured); *Frito-Lay, Inc. v. Dent*, 373 F. Supp. 771 (N.D. Miss. 1974); *States Steamship Company v. Featherstone*, 240 F. Supp. 830 (D. Or. 1965) (relief denied where shipowner sought declaration of nonliability for injuries to crewmembers caused by assault of coworkers); *Sun Oil Co. v. Transcontinental Gas Pipe Line Corp.*, 108 F. Supp. 280 (E.D. Pa. 1952), *aff'd* 203 F.2d 957 (3d Cir. 1953) (no declaratory relief where operator of tanker sought declaration of nonliability for damage to underwater pipeline fouled by plaintiff's anchor); *Aktiebolaget Bofors v. United States*, 93 F. Supp. 134 (D.C. 1950), *aff'd* 194 F.2d 145 (D.C. Cir. 1951) (no action may be entertained for declaratory judgment adjudicating that defendant is guilty of tort).

The federal courts reason that to compel potential personal injury plaintiffs to litigate their claims at a time and in a forum chosen by the alleged tort-feasor would be a perversion of declaratory judgment proceedings. *Cunningham Brothers, Inc. v. Bail, supra* (sustaining suit would force injured party to litigate claim he may not have wanted to litigate at time which might be inconvenient to him or which might precede his determination of the full extent of damages, and in forum chosen by alleged tort-feasor); *Frito-Lay, Inc. v. Dent, supra*.

See *Aetna Casualty & Surety Co. v. Yeatts*, 99 F.2d 665 (4th Cir. 1938). A court should not grant declaratory relief for a party who simply is in a position of one expecting to be sued and who desires an anticipatory adjudication at the time and place of its choice of the validity of defenses it expects to raise. See *Hanes Corp. v. Millard*, 531 F.2d 585 (D.C. Cir. 1976).

In addition, the *Cunningham Brothers, Inc.* court observed that the primary purpose of declaratory judgment proceedings is to prevent the accrual of avoidable damages to those not certain of their rights and to afford them an early adjudication without waiting until their adversaries should see fit to begin suit after damage had accrued. Where it is not contended that the action is brought to avoid damages which would accrue if a certain course of conduct were taken in the future, the suit must fall within some other purpose of declaratory judgment proceedings if it is to be entertained. *Id.*

It appears as well that the majority of state jurisdictions which have addressed this question have also held that a trial court should not exercise jurisdiction over a suit for declaration of nonliability by a potential or, in some instances, actual defendant. See, *Abor v. Black*, 695 S.W.2d 564 (Tex. 1985) (declaratory judgment filed by potential defendant in tort action seeking declaration of nonliability should not be entertained because defendant in effect chooses time and forum for trial by beating potential plaintiff to courthouse and filing suit seeking declaration of nonliability); *Howlett v. Scott*, 69 Ill. 2d 135, 370 N.E.2d 1036 (1977); *Donadio v. Cunningham*, 58 N.J. 309, 277 A.2d 375 (1971); *Employers' Fire Ins. Co. v. Beals*, 103 R.I. 623, 240 A.2d 397 (1968); *Ennis v. Casey*, 72 Idaho 181, 238 P.2d 435 (1951); *Bankers & Shippers Ins. Co. v. Kildow*, 9 Ark. App. 86, 654 S.W.2d 600 (1983); *Allstate Ins. Co. v. Shuman*, 163 Ga. App. 313, 293 S.E.2d 868 (1982); *K.M.S. Research Laboratories v. Willingham*, 629 S.W.2d 173 (Tex. App. 1982); *Watson v. Sansone*, 19 Cal. App. 3d 1, 96 Cal. Rptr. 387 (1971). Only in *Ditzler v. Spee*, 288 Minn. 314, 180 N.W.2d 178 (1970), has a state court allowed the use of a declaratory judgment action to litigate tort liability. In so doing, the court did not abrogate the basic rule cited above, but only found the circumstances of its case distinguishable.

The function of a declaratory judgment is to determine justiciable controversies which either are not yet ripe for adjudication by conventional forms of remedy or, for other reasons, are not conveniently amenable to the usual remedies. *Krieger v. Krieger*, 25 N.Y.2d 364, 254 N.E.2d 750, 306 N.Y.S.2d 441 (1969). See, *Volkswagenwerk v. Watson*, 181 Ind. App. 155, 390 N.E.2d 1082 (1979) (declaratory judgment statute not intended to eliminate well-known causes of action nor to substitute appellate court for tribunal of original jurisdiction where issues are ripe for litigation through usual processes; such statute intended to furnish full and adequate remedy when none existed before it); *In the Matter of Dewar*, 169 Mont. 437, 548 P.2d 149 (1976) (not purpose of declaratory judgment to provide substitute for other regular actions); *Rego Industries, Inc. v. American Mod. Metals Corp.*, 91 N.J. Super. 447, 221 A.2d 35 (1966) (denied declaratory relief where controversy had progressed to point where relief could be obtained in ordinary lawsuit).

Thus, we have noted that declaratory judgment does not lie where another equally serviceable remedy is available. *Hoiengs v. County of Adams*, 245 Neb. 877, 516 N.W.2d 223 (1994); *Barelmann v. Fox*, 239 Neb. 771, 478 N.W.2d 548 (1992); *Moore v. Black*, 220 Neb. 122, 368 N.W.2d 488 (1985). Here, the wrong (that is to say, the collision) has occurred, and declaratory relief is not necessary to protect Ryder from the accrual of further damages or to guide it in some future act. Any of Ryder's defenses to liability can be presented without any consequential harm to Ryder if and when Rollins brings suit against it.

In these circumstances, we hold that declaratory relief is inappropriate, since more effective relief can and should be obtained in other proceedings. See *Aetna Casualty & Surety Co. v. Yeatts*, 99 F.2d 665 (4th Cir. 1938) (benefits of declaratory judgment should not be extended unless there is actual controversy between parties, and even then court should not decide disputed question if result would be merely to anticipate trial of issue involved in pending case or to determine validity of defense which could be tried equally well therein or to try controversy piecemeal without complete decision of

matters in dispute).

As suggested by the judge in *Township of Ewing v. Trenton*, 137 N.J. Eq. 109, 110, 43 A.2d 813, 814 (1945), the declaratory judgment proceeding was not "intended to be utilized defensively to bag in advance an imminent and impending law suit." See, also, *Independent Tape Merchant's Association v. Creamer*, 346 F. Supp. 456 (M.D. Pa. 1972) (not to be granted if issuance appears calculated to reward winner of race to courthouse).

Accordingly, we reverse the judgment of the district court and remand the cause with the direction that it be dismissed.

REVERSED AND REMANDED WITH DIRECTION TO DISMISS.

GUY DEAN'S LAKE SHORE MARINA, INC., APPELLANT, V. BERNICE M. RAMEY, APPELLEE.

518 N.W.2d 129

Filed July 1, 1994. No. S-93-017.

1. **Landlord and Tenant: Leases: Time.** A tenant has no right to renew a lease unless the renewal option is exercised in a timely manner in strict accordance with the specifications of the lease agreement.
2. **Equity.** In dealing with legal rights, a court of equity adopts and follows the rules of law in all cases to which those rules are applicable, and whenever there is an explicit statute or a direct rule of law governing the case in all its circumstances, a court of equity is as much bound by it as would be a court of law.
3. _____. The maxim "equity follows the law" in its broad sense means that equity follows the law to the extent of obeying it and conforming to its general rules and policies whether contained in common law or statute.
4. **Pleadings: Demurrer.** Following sustainment of a demurrer, the losing party is entitled to amend the petition unless there exists no reasonable possibility that the amendment will remedy the deficiency.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Affirmed.

Gary J. Nedved, of Bruckner, O'Gara, Keating, Hendry, Davis & Nedved, P.C., for appellant.

Kevin J. Schneider, of Cline, Williams, Wright, Johnson & Oldfather, for appellee.

BOSLAUGH, WHITE, CAPORALE, FAHRNBRUCH, and LANPHIER, JJ.

CAPORALE, J.

This is an action in equity through which the plaintiff-appellant lessee, Guy Dean's Lake Shore Marina, Inc., seeks to compel the defendant-appellee lessor, Bernice M. Ramey, to extend the term of the parties' lease agreement. The district court sustained Ramey's demurrer and subsequently dismissed the marina's petition. Assigning the dismissal as error, the marina appealed to the Nebraska Court of Appeals. On our own motion, we removed the matter to this court in order to regulate the caseloads of the two courts. We affirm.

According to the petition, on August 31, 1967, the marina leased the commercial property in question from Ramey for a term of 25 years, commencing January 1, 1968, and expiring December 31, 1992, with options to renew for two additional 25-year terms. The renewal provision required the marina to give Ramey certified mail notice of its election to exercise the first option on or before July 1, 1992. The lease agreement further provided that if the marina did not exercise the renewal option before July 1, 1992, the tenancy would automatically terminate on December 31, 1992, and that time was of the essence.

While the lease gave the marina the right to make improvements to the real estate, it also provided that any improvements or affixed additions would, at the expiration of the lease or any extension or renewal thereof, become Ramey's property. During the lease period, the marina made substantial improvements on the premises.

The marina failed to give the required notice of its intent to exercise the option by the July 1, 1992, deadline, and on July 21, Ramey notified the marina that the option had expired. The marina then orally advised Ramey that it intended to extend the lease; Ramey, however, informed the marina that the lease would expire as of December 31 and that she would evict the marina from the premises. The marina nonetheless sent written

confirmation of its intent to renew in a letter dated July 22, 1992, and, in a letter dated October 8, 1992, expressed more specifically its intent to exercise the option and extend the term an additional 25 years.

The marina urges that as its failure to timely exercise its renewal option was the result of "honest mistake" or "excusable default" which did not prejudice Ramey, the deadline should not be strictly enforced, for to do so would cause it "unconscionable harm." The petition does not describe the nature of the mistake or default, but the parties argue the matter as if the marina simply forgot the deadline.

In support of its position, the marina cites four cases from other jurisdictions: *Linn Corp. v. LaSalle Nat'l Bk.*, 98 Ill. App. 3d 480, 424 N.E.2d 676 (1981); *JNA Realty v Cross Bay*, 42 N.Y.2d 392, 366 N.E.2d 1313, 397 N.Y.S.2d 958 (1977); *Sosanie v. Pernetti Holding Corp.*, 115 N.J. Super. 409, 279 A.2d 904 (1971); *Trollen v. City of Wabasha*, 287 N.W.2d 645 (Minn. 1979).

Each of these cases found a basis in equity to avoid application of the general rule, which is that acceptance of an option to extend a lease must be strictly in accordance with the terms of the option. 1 Samuel Williston, A Treatise on the Law of Contracts § 5:18 (4th ed. 1990); *Western Sav. Fund, Etc. v. Southeastern, Etc.*, 285 Pa. Super. 187, 427 A.2d 175 (1981); *Koch v. H. & S. Development Co.*, 249 Miss. 590, 163 So. 2d 710 (1964); *McClellan v. Ashley*, 200 Va. 38, 104 S.E.2d 55 (1958); *Bekins Moving & Storage v. Prudential Ins.*, 176 Cal. App. 3d 245, 221 Cal. Rptr. 738 (1985); *Simons v. Young*, 93 Cal. App. 3d 170, 155 Cal. Rptr. 460 (1979); *Ahmed v. Scott*, 65 Ohio App. 2d 271, 418 N.E.2d 406 (1979); *Reynolds-Penland Co. v. Hexter & Lobello*, 567 S.W.2d 237 (Tex. App. 1978); *Woodrum v. Pulliam*, 453 S.W.2d 263 (Ky. App. 1970); *Clayman v. Totten*, 56 App. D.C. 115, 10 F.2d 910 (1926). Each also noted, however, that generally, equity will not relieve against mere forgetfulness when a tenant fails to give timely notice.

In *Linn Corp., supra*, the lessee brought an action for specific performance of a lease renewal option which required the tenant to make " 'at least' $60,000 worth of improvements"

and to provide written notice of the intention to exercise the option " ' "not less than one year prior to expiration of the original term . . ." ' " 98 Ill. App. 3d at 481, 424 N.E.2d at 677. On several occasions prior to the expiration of the notice period, the tenant orally notified the landlord of the former's intention to renew the lease. However, the tenant did not send written notification until after the landlord notified the tenant that the option term had expired. The *Linn Corp.* court reasoned that those facts warranted equity's intervention. The court, citing *Dikeman v. Sunday Creek Coal Co.*, 184 Ill. 546, 56 N.E. 864 (1900), nonetheless wrote:

> " 'A court of equity is bound by a contract as the parties have made it, and has no authority to substitute for it another and different agreement, and particular language is not necessary to make the time of performance essential, *if right and justice in the individual case demand it*. An agreement must be complied with as made unless some stipulation is waived or there is just excuse for non-compliance. . . .' "

(Emphasis in original.) 98 Ill. App. 3d at 483, 424 N.E.2d at 678. In *JNA Realty, supra*, the court noted that equity should give relief for the " 'venial inattention' " of the tenant when the gravity of the hardship outweighs the gravity of the fault. 42 N.Y.2d at 399, 366 N.E.2d at 1317, 397 N.Y.S.2d at 962. Likewise, in *Sosanie, supra*, the court considered the forgetting of a deadline to be an honest mistake of fact and excused a 40-day delay in giving the required notice to renew. And in *Trollen, supra*, the court excused the failure to give timely written notice to renew where the parties had in the past dealt with each other in a less formal manner.

It should be noted, however, that *JNA Realty* was decided by a sharply divided court in which the dissenters observed that the majority opinion upset established precedent, introduced instability in business transactions, and disregarded commercial realities. They reasoned that mere negligence does not justify departing from the rule that notice of an intention to exercise an option to renew must be given within the prescribed period and emphasized that equitable relief is not justified merely by the fact that a party will suffer some sort of economic

detriment, writing:

> Once an option to renew a lease has been conditioned upon the tenant's giving timely notice, the commercial lessee should not be heard to complain that through carelessness a valued asset has been lost, anymore than one would allow the landlord to complain of the economic detriment to him in agreeing to an improvident option to renew.

42 N.Y.2d at 404, 366 N.E.2d at 1320, 397 N.Y.S.2d at 965. The dissenters also noted that under the guise of sheer inadvertence, a tenant could gamble with a fluctuating market at the expense of the landlord by delaying the renewal decision beyond the time fixed within the agreement and warned that such instability would allow for ad hoc dispensations in particular cases without reliable rules that are essential to commercial enterprises.

The exception articulated in *JNA Realty v Cross Bay*, 42 N.Y.2d 392, 366 N.E.2d 1313, 397 N.Y.S.2d 958 (1977), was narrowed in *Soho Development Corp. v. Dean & DeLuca*, 131 A.D.2d 385, 517 N.Y.S.2d 498 (1987). The *Soho Development Corp.* court determined that a tenant could not exercise the lease renewal option after it had expired because the landlord had not misled the tenant, and there was no ambiguity in the lease. *Soho Development Corp.* distinguished *JNA Realty* on the ground that while the *JNA Realty* landlord had regularly informed the tenant of its other obligations under the lease, the landlord had failed to inform the tenant of the impending expiration of the option.

More importantly, our precedent has long adhered to the general rule. For example, in *Wolf v. Tastee Freez Corp.*, 172 Neb. 430, 109 N.W.2d 733 (1961), we held that a tenant who provided only an 89-day written notice in the face of a provision which required a 90-day written notice had failed to properly exercise the renewal option. In so ruling, we wrote:

> The lessors' agreement to renew is an executory contract, and until the lessee has exercised it in some affirmative way, the lessor cannot be held for the additional term. That the acceptance of an offer must be made within the time specified in the offer is a general rule of law. . . . "The

> power to create a contract by acceptance of an offer terminates at the time specified in the offer . . . ." . . . [U]nder a provision specifically designating the time within which notice must be given, that time is of the essence, and such provision is to be strictly construed.

172 Neb. at 432, 109 N.W.2d at 735. Therefore, a tenant has no right to the renewal term unless the option is exercised in a timely manner in strict accordance with the specifications of the lease agreement. See, also, *Gleeson v. Frahm*, 211 Neb. 677, 320 N.W.2d 95 (1982); *State Securities Co. v. Daringer*, 206 Neb. 427, 293 N.W.2d 102 (1980); *Master Laboratories, Inc. v. Chesnut*, 154 Neb. 749, 49 N.W.2d 693 (1951); *Wright v. Barclay*, 151 Neb. 94, 36 N.W.2d 645 (1949); *In re Estate of Lee*, 137 Neb. 567, 290 N.W. 437 (1940).

The marina, however, argues that *Wolf* is distinguishable from the instant case because *Wolf* was an action at law and thus did not address the equitable issues presented here. The marina claims that a forfeiture will result if it is forced from the leasehold due to the substantial improvements it has made during its tenancy. However, as noted by the Restatement (Second) of Contracts § 25, comment *d.* (Reporter's Note) at 75 (1981):

> Despite equity's dislike of forfeitures . . . requirements governing the time and manner of exercise of a power of acceptance under an option contract are applied strictly. It is reasoned that any relaxation of terms would substantively extend the option contract to subject one party to greater obligations than he bargained for.

Similarly, 1 Samuel Williston, A Treatise on the Law of Contracts § 5:18 at 740-42 (4th ed. 1990), observes:

> When the optionee decides to exercise his option, he must act unconditionally and according to the terms of the option, and as soon as the acceptance is so made, the optionor becomes bound. Nothing less than an unconditional and precise acceptance will suffice unless the optionor waives one or more of the terms of the option. . . . Because the option itself affords the offeree protection against the offeror's inconsistent action, the general attitude of the courts is to construe the attempt to

accept the terms offered under the option strictly. The problem of a potential forfeiture does not enter into the matter.

Moreover, contrary to the marina's position, no forfeiture is involved. The renewal option did not grant it a right to renew the lease; it merely gave the marina the right to accept within a stated time Ramey's offer to extend the lease for the additional term. When the marina failed to comply with the terms of the option, the option expired, and as a result, the marina lost the power of acceptance under the terms of the lease.

In relying on the so-called equities created by the improvements the marina made, the marina overlooks that as the option rendered Ramey's offer to extend irrevocable until the specified expiration date, Ramey was at risk for a period of 24 years 6 months, or until July 1, 1992, when the option expired. The marina, on the other hand, was free during that period to consider whether market conditions dictated relocation, thus counseling against extension of the lease.

In dealing with legal rights, a court of equity adopts and follows the rules of law in all cases to which those rules are applicable, and whenever there is an explicit statute or a direct rule of law governing the case in all its circumstances, a court of equity is as much bound by it as would be a court of law. *McCauley v. Stewart*, 177 Neb. 759, 131 N.W.2d 174 (1964).

The maxim " ' "[e]quity follows the law" ' " in its broad sense means that equity follows the law to the extent of obeying it and conforming to its general rules and policies whether contained in common law or statute. *In re Petition of Ritchie*, 155 Neb. 824, 828, 53 N.W.2d 753, 756 (1952). The maxim is strictly applicable whenever the rights of the parties are clearly defined and established by law. *Id.*

There being no basis for departing from our precedent, we decline the marina's invitation to do so. Since the allegations here show no legal duty from Ramey to the marina, and the marina cannot change the fact that it forgot the deadline, the district court properly dismissed the marina's petition. See *Anderson v. Matthis*, *ante* p. 215, 518 N.W.2d 94 (1994) (following sustainment of demurrer, losing party entitled to

amend unless there exists no reasonable possibility amendment will remedy deficiency).

AFFIRMED.

HASTINGS, C.J., and WRIGHT, J., not participating.

STATE OF NEBRASKA, APPELLANT, V. RONALD L. HOFFMAN, APPELLEE.

517 N.W.2d 618

Filed July 1, 1994. No. S-93-744.

1. **Constitutional Law: Sentences: Appeal and Error.** Neb. Rev. Stat. § 29-2322 (Cum. Supp. 1992) held constitutional.
2. **Sentences: Sexual Assault.** Sentence of 5 years' probation for first degree sexual assault on a child held excessively lenient.

Appeal from the District Court for Douglas County: MARY G. LIKES, Judge. Sentence modified.

James S. Jansen, Douglas County Attorney, and Robert Francis Cryne for appellant.

Daniel W. Ryberg for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ.

BOSLAUGH, J.

The defendant, Ronald L. Hoffman, was found guilty by a jury of first degree sexual assault on a child. The trial court sentenced the defendant to 5 years of intensively supervised probation, with 100 days of electronic monitoring, and the last 90 days to be served in the Douglas County Correction Center unless waived by the court.

The State has appealed to this court, contending the sentence is excessively lenient.

The victim in this case was born November 12, 1979. He was 13 years old at the time of trial. The defendant was born August 13, 1963, and was 29 years old at the time of trial.

The defendant had befriended the victim's family approximately 6 to 8 years prior to the charged offense. The

defendant began to pay special attention to the victim sometime between the victim's 9th and 10th birthdays. The defendant provided the boy with treats and took him on outings on a weekly basis over the following years.

The victim would spend the night at the defendant's home and sleep in his bed with him over the same period of time. The victim testified that this occurred every weekend or almost every weekend.

The victim testified that when he slept in the defendant's bed, the defendant would fondle the victim's private parts. When the victim resisted these advances, the defendant would strike him. The victim testified that the defendant would tell him that the touching was a secret and not to tell anyone. The victim testified that the years of fondling culminated in an act of oral intercourse performed on the boy by the defendant in October 1992.

The victim reported the incident of oral intercourse to his mother after he had been sent home from school for threatening his classmates. The mother suspected, based on the victim's behavior at home and school, that the victim might have been abused.

The victim comes from a dysfunctional family. He has had a history of behavior problems in school; however, the problems worsened during the last 2 years of the victim's relationship with the defendant.

After the victim reported the abuse by the defendant, the victim was hospitalized for a month. He was diagnosed as suffering from posttraumatic stress disorder, major depression, identity disorder, and oppositional defiant disorder.

In addition to our consideration of the State's assignment of error regarding the leniency of the trial court's sentence, we will first consider the defendant's claim that Neb. Rev. Stat. § 29-2322 (Cum. Supp. 1992) is unconstitutional because it requires an appellate court to consider factors different from those the trial court considers in determining the leniency of a sentence and because the standard of review for the State's appeal of a lenient sentence is different from the standard of review for a defendant's appeal of an excessive sentence. The defendant's argument is without merit.

The defendant's approach to this case assumes that § 29-2322 and Neb. Rev. Stat. § 29-2260(2)(a) (Reissue 1989) are mutually exclusive. We have said that a sentencing court has a broad discretion in the source and type of evidence that the court may use in determining the kind and extent of punishment to be imposed within the limits fixed by statute. *State v. Minor*, 188 Neb. 23, 195 N.W.2d 155 (1972). The fact is that the court should consider all of the circumstances of the case in determining a proper sentence.

In *State v. Foral*, 236 Neb. 597, 599, 462 N.W.2d 626, 628 (1990), this court stated:

> When the State appeals from a sentence, contending that it is excessively lenient, this court reviews the record for an abuse of discretion, and a grant of probation will not be disturbed unless there has been an abuse of discretion by the sentencing court. *State v. Dobbins*, 221 Neb. 778, 380 N.W.2d 640 (1986). In reviewing such a case for an abuse of discretion, "our review is governed by § 29-2322, which sets out the factors we are to consider in determining whether the sentence imposed is 'excessively lenient.' Additionally, we note that § 29-2260(2)(a), (b), and (c) sets out factors to be considered by a sentencing judge in determining if a defendant should be imprisoned, while § 29-2260(3)(a) through (k) sets out factors to be considered in the decision to withhold imprisonment. The sentencing judge's discretion is guided by all these factors. Our review of the alleged abuse of the sentencing judge's discretion, therefore, must recognize these statutory guidelines set out for the direction of the sentencing judge in imposing or withholding imprisonment." *State v. Jallen*, [218 Neb. 882,] 884, 359 N.W.2d [816,] 818 [(1984)].

A sentence of imprisonment that is within the statutory limits will not be disturbed on appeal in the absence of an abuse of discretion by the trial court. *State v. Ellen*, 243 Neb. 522, 500 N.W.2d 818 (1993).

As reflected in the above-cited cases, there is not a different standard of review for sentences when the State appeals a sentence as excessively lenient or when a defendant appeals a

sentence as excessive. An appellate court reviews for an abuse of discretion in either case. Furthermore, while an appellate court's review for an abuse of discretion in a sentence claimed to be excessively lenient is governed by § 29-2322, the appellate court must also recognize the statutory guidelines in § 29-2260 considered by the sentencing judge in his or her determining whether a defendant should be imprisoned or not.

In this case, the defendant was convicted of first degree sexual assault on a child, which is a Class II felony. See Neb. Rev. Stat. § 28-319(1)(c) (Reissue 1989). A Class II felony is punishable by a maximum of 50 years' imprisonment and a minimum of 1 year's imprisonment. Neb. Rev. Stat. § 28-105 (Reissue 1989).

Section 29-2260 provides in pertinent part:

> (2) Whenever a court considers sentence for an offender convicted of either a misdemeanor or a felony for which mandatory or mandatory minimum imprisonment is not specifically required, the court may withhold sentence of imprisonment unless, having regard to the nature and circumstances of the crime and the history, character, and condition of the offender, the court finds that imprisonment of the offender is necessary for protection of the public because:
>
> (a) The risk is substantial that during the period of probation the offender will engage in additional criminal conduct;
>
> (b) The offender is in need of correctional treatment that can be provided most effectively by commitment to a correctional facility; or
>
> (c) A lesser sentence will depreciate the seriousness of the offender's crime or promote disrespect for law.
>
> (3) The following grounds, while not controlling the discretion of the court, shall be accorded weight in favor of withholding sentence of imprisonment:
>
> (a) The crime neither caused nor threatened serious harm;
>
> (b) The offender did not contemplate that his or her crime would cause or threaten serious harm;
>
> (c) The offender acted under strong provocation;

(d) Substantial grounds were present tending to excuse or justify the crime, though failing to establish a defense;

(e) The victim of the crime induced or facilitated commission of the crime;

(f) The offender has compensated or will compensate the victim of his or her crime for the damage or injury the victim sustained;

(g) The offender has no history of prior delinquency or criminal activity and has led a law-abiding life for a substantial period of time before the commission of the crime;

(h) The crime was the result of circumstances unlikely to recur;

(i) The character and attitudes of the offender indicate that he or she is unlikely to commit another crime;

(j) The offender is likely to respond affirmatively to probationary treatment; and

(k) Imprisonment of the offender would entail excessive hardship to his or her dependents.

Regarding the factors under subsection (2), there is a risk that during a period of probation the defendant would engage in additional criminal conduct. An evaluation of the defendant indicates that the defendant has "somewhat less than average compliance to social expectations." Furthermore, a sentence of probation depreciates the seriousness of the defendant's crime and promotes disrespect for the law.

As to the factors under subsection (3), there are none that apply to the defendant.

Section 29-2322 requires an appellate court, when determining whether a sentence is excessively lenient, to have regard for the following:

(1) The nature and circumstances of the offense;

(2) The history and characteristics of the defendant;

(3) The need for the sentence imposed:

(a) To afford adequate deterrence to criminal conduct;

(b) To protect the public from further crimes of the defendant;

(c) To reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the

offense; and

(d) To provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; and

(4) Any other matters appearing in the record which the appellate court deems pertinent.

After reviewing the standards set out in § 29-2322 and the factors set forth in § 29-2260, we find that the sentence to probation in this case was excessively lenient and that the trial court abused its discretion in granting probation.

The offense for which the defendant was convicted followed a lengthy history of other sexual assaults upon the victim involving violence. While the defendant had no prior felony convictions, his criminal record includes traffic violations, a conviction of driving under the influence of alcohol, and two convictions of theft. The defendant has expressed no remorse for his actions.

A sentence to imprisonment is needed in this case to afford adequate deterrence of this type of criminal conduct, to protect the public from further crimes by the defendant, to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense committed.

The trial court abused its discretion by sentencing the defendant to probation, and we, therefore, vacate that order and sentence the defendant to the Department of Correctional Services for a term of not less than 6 nor more than 8 years.

SENTENCE MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. CHARLES RAYMOND McCORMICK, APPELLANT.
STATE OF NEBRASKA, APPELLEE, V. DAVID EUGENE HALL, APPELLANT.

518 N.W.2d 133

Filed July 1, 1994. Nos. S-93-844, S-93-845.

1. **Jurisdiction: Time: Appeal and Error.** Timeliness of an appeal is jurisdictional.
2. **Criminal Law: Jurisdiction: Appeal and Error.** Neb. Rev. Stat. § 25-1912 (Cum. Supp. 1992) sets forth the only method by which a party may invoke the jurisdiction of an appellate court to review a criminal case.
3. **Criminal Law: Judgments.** In a criminal case, judgment occurs when the verdict and sentence are rendered by the court.
4. **Criminal Law: Motions for New Trial: Time: Appeal and Error.** Although Neb. Rev. Stat. § 25-1912(2) (Cum. Supp. 1992) provides for the termination of the 30-day limitation period for filing a notice of appeal, this terminating provision does not apply to criminal actions. The filing of a motion for new trial shall have no effect on the jurisdictional requirement that, in a criminal action, an appealing party must file a notice of appeal within 30 days after the date of sentencing.
5. **Motions for New Trial: Evidence: Time.** A motion for new trial must be filed within 10 days of the verdict unless the motion is based on newly discovered evidence material to the moving party, which he could not with reasonable diligence have discovered and produced at trial, or unless filing within 10 days was unavoidably prevented. If the motion is filed more than 10 days after the verdict, the motion shall have no effect unless it falls within one of the two statutory exceptions.
6. **Motions for New Trial: Time: Appeal and Error.** Unlike the 30-day limitation provided by Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 1992), the 10-day limitation period for filing a motion for new trial begins to run from the date of the verdict, not the date of sentencing.
7. **Motions for New Trial: Appeal and Error.** A motion for new trial based on newly discovered evidence is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the determination of the trial court will not be disturbed on appeal.
8. **Motions for New Trial: Evidence.** To constitute newly discovered evidence, the evidence presented in a motion for new trial must be material to the moving party and must be evidence which he could not with reasonable diligence have discovered and produced at trial.
9. _____: _____. Materiality has been explained as referring to newly discovered evidence which is so potent that by strengthening the evidence already offered, a new trial would probably result in a different verdict; the newly discovered evidence must be relevant and credible and not merely cumulative.
10. **Motions for New Trial: Words and Phrases.** Reasonable diligence is defined as

appropriate action where there is some reason to awaken inquiry and direct diligence in a channel in which it will be successful.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Affirmed.

Chris M. Arps, of Arps & Schirber Law Offices, for appellants.

Don Stenberg, Attorney General, and Joseph P. Loudon for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, FAHRNBRUCH, and LANPHIER, JJ.

WHITE, J.

These appeals arise from the convictions of the appellants, Charles Raymond McCormick and David Eugene Hall, for manufacturing a controlled substance: marijuana. Appellants were each sentenced to 5 years' imprisonment.

This case involves three codefendants, McCormick, Hall, and Bryle Edward Radden. The appeals of McCormick and Hall are consolidated on appeal because appellants raise the same issues and are represented by the same attorney.

This case comes before the court with numerous procedural problems which have caused a tremendous amount of confusion between the parties regarding what proceedings and issues are before this court for review. It will be helpful to first outline the chronology of events surrounding the arrest and prosecution of the appellants and then determine which proceedings are properly before this court for review.

On January 19, 1993, pursuant to a search warrant, the Sarpy County sheriff's office simultaneously executed search warrants on two separate residences. During the course of these searches, evidence was gathered and several arrests were made. Among those persons arrested were McCormick and Hall. McCormick and Hall were each charged with one count of manufacturing a controlled substance, to wit: marijuana; possession of marijuana (more than 1 pound); and failing to affix a tax stamp.

The criminal investigation leading up to the searches commenced after an anonymous informant provided

information to the police. On March 17, prior to trial, appellants learned that the informant had been on probation at the time he provided the information to the police. Concerned that evidence derived from the information provided by the informant might be inadmissible pursuant to Neb. Rev. Stat. § 29-2262.01 (Reissue 1989), defense counsel attempted to discern the informant's role in the investigation. In response, the county attorney told the court that the informant did not act as an employee or undercover agent of the law enforcement agency when he provided the information. Although the district court did not allow appellants to learn the identity of the informant, the court did permit defense counsel to question, under oath, two Sarpy County police officers regarding the nature of the informant's involvement in the investigation.

Defense counsel was permitted to question Sgt. Mark A. Topil and Deputy Sheriff Randall J. Scott, each of whom had direct contact with the informant. During the questioning defense counsel inquired whether the informant was on probation or parole. The officers told defense counsel that the informant was on probation when he provided the information to the police. Defense counsel also asked the officers whether the informant was paid for the information. Topil stated that the informant was not paid for providing information to the police. Defense counsel then attempted to question the officers about the informant's criminal history and alleged history of substance abuse. The district court sustained the county attorney's objections to those questions. Defense counsel did not ask the officers any other questions regarding the informant or his role in the criminal investigation.

On April 19, the district court held a bench trial based on stipulated facts. On April 20, the district court found each appellant guilty of one count of manufacturing a controlled substance.

After the guilty verdict was rendered, but before sentencing, a private investigator hired by appellants discovered the informant's name and criminal history. On June 3, appellants filed motions for new trial based on newly discovered evidence. The basis for appellants' motions was the information the investigator had gathered about the informant. On June 4,

appellants were each sentenced to 5 years' imprisonment.

At a hearing held June 11 on appellants' motions, the district court ordered the county attorney to disclose to appellants the name of the informant and allow appellants to depose the informant. On July 5 and August 23, appellants served the county attorney with notice of scheduled depositions of the informant. On both occasions, the county attorney refused to appear, refused to disclose the identity of the informant, and refused to produce the informant for the depositions. The county attorney subsequently filed his own appeal from the June 11 order.

Without any other action, the district court denied appellants' motions for new trial based on newly discovered evidence on August 25. Appellants filed motions for rehearing, and on September 10 the court denied those motions. On September 23, appellants each filed a notice of appeal.

Before considering the merits of the issues raised on appeal, we must first consider appellee's argument that the appeals are not timely. Timeliness of an appeal is jurisdictional. *In re Interest of J.A.*, 244 Neb. 919, 510 N.W.2d 68 (1994); *Metrejean v. Gunter*, 240 Neb. 166, 481 N.W.2d 176 (1992); *State v. Spotted Elk*, 227 Neb. 869, 420 N.W.2d 707 (1988); *State v. Stickney*, 222 Neb. 465, 384 N.W.2d 301 (1986).

Liberally construing appellants' arguments, we note that they appeal from two separate proceedings: (1) the judgments and (2) the orders overruling their motions for new trial based on newly discovered evidence. In determining the timeliness of the appeals, we will separately address each of these proceedings.

Neb. Rev. Stat. § 25-1912 (Cum. Supp. 1992) sets forth the only method by which a party may invoke the jurisdiction of an appellate court to review a criminal case. Section 25-1912(1) provides that

> the proceedings to obtain a reversal, vacation, or modification of judgments and decrees rendered or final orders made by the district court . . . shall be by filing in the office of the clerk of the district court in which such judgment, decree, or final order was rendered, within thirty days after the rendition of such judgment or decree

> or the making of such final order, a notice of intention to prosecute such appeal signed by the appellant . . . .

In a criminal case, judgment occurs when the verdict *and* sentence are rendered by the court. *Spotted Elk, supra* (stating that in a criminal case the judgment date is the date on which the defendant is sentenced); *State v. Long*, 205 Neb. 252, 286 N.W.2d 772 (1980). Although § 25-1912(2) provides for the termination of the 30-day limitation period, this terminating provision does not apply to criminal actions. *Spotted Elk, supra.* Thus, the filing of a motion for new trial shall have no effect on the jurisdictional requirement that, in a criminal action, an appealing party must file a notice of appeal within 30 days after the date of sentencing. See *State v. Flying Hawk*, 227 Neb. 878, 420 N.W.2d 323 (1988).

In the instant case the district court rendered its guilty verdicts on April 20 and sentenced appellants on June 4. Each appellant timely filed a notice of appeal on June 4. Those appeals, however, were dismissed by the Nebraska Court of Appeals. *State v. McCormick*, 4 NCA xi (case No. A-93-494, Aug. 19, 1993); *State v. Hall*, 4 NCA xi (case No. A-93-495, Aug. 19, 1993). Contra *Smith v. State*, 167 Neb. 492, 93 N.W.2d 499 (1958) (holding that proceedings in an appeal filed in the Supreme Court and in a motion for new trial on the ground of newly discovered evidence filed in district court may be separately conducted in both courts at the same time). Appellants did not seek further review of the dismissals by the Court of Appeals. Despite the questionable ruling of the Court of Appeals, the dismissals terminated the appeals, and the notices of appeal filed by appellants on June 4 is ineffective to confer jurisdiction on this court to review the present appeals. Thus, appellants failed to properly invoke the jurisdiction of this court to review their appeals from the judgment.

Although the filing of a motion for new trial in a criminal case does not terminate the running of the 30-day period in which a criminal defendant must file a notice of appeal, the Nebraska criminal procedure statutes allow a criminal defendant to file a motion for new trial. Neb. Rev. Stat. §§ 29-2101 to 29-2103 (Reissue 1989). See Neb. Rev. Stat. § 25-1912.01 (Reissue 1989) (generally, motions for new trial

are not a prerequisite to perfecting an appeal). It is also apparent from a reading of the relevant statutes that a party who timely files a motion for new trial pursuant to those statutes may appeal from the overruling of such a motion provided that the party complies with § 25-1912(1). In this respect, a party may be able to preserve for appellate review issues which are presented to the district court in a timely filed motion for new trial. We caution, however, that such an appeal will be limited to those issues properly presented to the trial court in the motion.

Section 29-2101 sets forth six reasons for which a party may file a motion for new trial. § 29-2101. To be effective, the motion must be filed within 10 days of the verdict unless the motion is based on newly discovered evidence material to the moving party, which he could not with reasonable diligence have discovered and produced at trial, or unless filing within 10 days was unavoidably prevented. § 29-2103; *State v. Thompson*, 244 Neb. 375, 507 N.W.2d 253 (1993); *State v. Daly*, 227 Neb. 633, 418 N.W.2d 767 (1988). Unlike the 30-day limitation provided by § 25-1912(1), the 10-day limitation for filing a motion for new trial begins to run from the date of the verdict, not the date of sentencing. *Daly, supra*; *State v. Applegarth*, 196 Neb. 773, 246 N.W.2d 216 (1976) (explaining that the 10-day limit runs from the date of verdict, not the date of the sentencing, unless the verdict and sentencing occur on the same day); *State v. Wood*, 195 Neb. 353, 238 N.W.2d 226 (1976). If the motion is filed more than 10 days after the verdict, the motion shall have no effect unless it falls within one of the two statutory exceptions stated above. *Thompson, supra* (stating that the requirements of § 29-2103 are mandatory; if the motion is not timely filed, it will not be considered on appeal); *Daly, supra*; *State v. Hawkman*, 198 Neb. 578, 254 N.W.2d 90 (1977) (discussing what constitutes "unavoidably prevented" and considering only those issues timely raised). As stated above, when a party files a timely motion for new trial and does not otherwise file a timely notice of appeal from the judgment, the only issues which may be preserved for appellate review are those issues raised in the motion.

In the instant case, the district court entered its verdicts

against appellants on April 20, 1993. Appellants filed motions for new trial on June 3. The motions were filed more than 10 days after the verdicts and were limited only to issues relating to the alleged newly discovered evidence. Therefore, only the issues relating to the newly discovered evidence have been preserved for our review.

To summarize, the notices of appeal filed by appellants were dismissed by the Court of Appeals and are ineffective to confer jurisdiction over the present appeals. Moreover, the motions for new trial filed by appellants did not preserve any issues arising from the judgments. This court, therefore, lacks jurisdiction to address the appeals from the judgments.

As stated above, however, we do have jurisdiction to consider the appeals from the overruling of appellants' motions for new trial based on newly discovered evidence. The 10-day limitation period for filing a motion for new trial does not apply to motions based on newly discovered evidence. Appellants' motions for new trial based on newly discovered evidence, therefore, were timely filed. See, § 29-2103; *State v. Atwater*, 245 Neb. 746, 515 N.W.2d 431 (1994) (stating that a motion for new trial must be filed within 10 days after the verdict is rendered, unless the motion is based on newly discovered evidence); *Thompson, supra*; *Applegarth, supra*. The district court overruled those motions on August 25. Pursuant to § 25-1912(1), appellants timely filed notices of appeal from those final orders on September 23. This court, therefore, has jurisdiction over the proceeding in which the district court overruled appellants' motions for new trial based on newly discovered evidence. We thus confine our analysis in this case to whether the district court should have overruled appellants' motions for new trial.

A motion for new trial based on newly discovered evidence is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the determination of the trial court will not be disturbed on appeal. *State v. Hirsch*, 245 Neb. 31, 511 N.W.2d 69 (1994); *State v. Boppre*, 243 Neb. 908, 503 N.W.2d 526 (1993); *State v. Campbell*, 239 Neb. 14, 473 N.W.2d 420 (1991); *State v. Jensen*, 238 Neb. 801, 472 N.W.2d 423 (1991); *State v. Donnelson*, 225 Neb. 41, 402 N.W.2d 302

(1987); *State v. French*, 200 Neb. 137, 262 N.W.2d 711 (1978).

To constitute newly discovered evidence, the evidence presented in the motion must be material to the moving party and must be evidence which he could not with reasonable diligence have discovered and produced at trial. *Boppre, supra*; *State v. Glouser*, 193 Neb. 190, 226 N.W.2d 328 (1975). Materiality has been explained as referring to newly discovered evidence which is "so potent that by strengthening the evidence already offered, a new trial would probably result in a different verdict; the newly discovered evidence must be relevant and credible and not merely cumulative." *Boppre*, 243 Neb. at 928, 503 N.W.2d at 538 (citing *State v. Fellman*, 236 Neb. 850, 464 N.W.2d 181 (1991), and *State v. Batiste*, 231 Neb. 481, 437 N.W.2d 125 (1989), *disapproved on other grounds, State v. Pettit*, 233 Neb. 436, 445 N.W.2d 890 (1989)). Accord, *State v. Hortman*, 207 Neb. 393, 299 N.W.2d 187 (1980); *State v. Pierce*, 204 Neb. 433, 283 N.W.2d 6 (1979), *overruled on other grounds*, *State v. Ellis*, 214 Neb. 172, 333 N.W.2d 391 (1983); *State v. Smith*, 202 Neb. 501, 276 N.W.2d 104 (1979); *French, supra*; *Glouser, supra*. We have defined reasonable diligence as "appropriate action where there is some reason to awaken inquiry and direct diligence in a channel in which it will be successful." *Hirsch*, 245 Neb. at 50, 511 N.W.2d at 82 (citing *State v. Munson*, 204 Neb. 814, 285 N.W.2d 703 (1979)).

At this juncture, we note that appellants failed to properly assign as error the overruling of the motions for new trial. On appeal, appellants did assert and discuss as error the use of evidence derived from the informant in violation of § 29-2262.01. This is, in essence, the same error asserted in their motions. From our review of the motions and the hearing held on those motions, appellants appear to argue that the newly discovered evidence demonstrates that the evidence derived from the informant should have been excluded from their trials pursuant to § 29-2262.01. Thus, the substance of the error is before this court, and in an effort to give this case complete appellate review, we will consider the error asserted in appellants' motions.

We now consider whether the evidence provided in appellants' motions is material and whether the evidence is such

that appellants could not with reasonable diligence have discovered and produced at trial.

As stated above, evidence is material if it is so potent that by strengthening the evidence already offered, its use in a new trial would probably result in a different verdict. Additionally, the newly discovered evidence must be relevant and credible and not merely cumulative. In considering whether the evidence presented by appellants is material, it is necessary to consider what factors are relevant to the application of § 29-2262.01. That statute provides:

> A person placed on probation by a court of the State of Nebraska, an inmate of any jail or correctional or penal facility, or an inmate who has been released on parole, probation, or work release shall be prohibited from acting as an undercover agent or employee of any law enforcement agency of the state or any political subdivision. Any evidence derived in violation of this section shall not be admissible against any person in any proceeding whatsoever.

This statute mandates that any evidence derived from a person who falls within the class of persons described in the statute shall be inadmissible at trial. *State v. Schuh*, 237 Neb. 667, 467 N.W.2d 409 (1991) (single-judge opinion); *State v. Wilcox*, 230 Neb. 123, 430 N.W.2d 58 (1988) (single-judge opinion).

Prior to trial, appellants had actual knowledge that the informant was on probation at the time he provided information to the police. Appellants maintain that after trial, they learned the name of the informant, his criminal history, and that he was in county jail when he provided the information to police. We find that this alleged newly discovered evidence is not of such a quality that if a new trial is granted, its consideration would change the result.

The exclusionary rule provided by § 29-2262.01 does not apply unless the informant is both (1) in jail, on probation, or on parole and (2) acting as an undercover agent or employee of a law enforcement agency. *Schuh, supra* (finding that the informant was on parole but did not act as an undercover agent). The alleged new evidence does not make it any more likely that the evidence derived from the informant would have

been excluded pursuant to § 29-2262.01. See, *Hortman, supra* (finding that the proffered evidence would not likely have resulted in a different verdict); *Munson, supra*.

The alleged new evidence is the same in quality as the evidence that appellants were aware of prior to trial. The evidence available prior to trial established that the informant fell within the first classification set forth in § 29-2262.01 because he was on probation at the time that he provided the information to police. The alleged new evidence also establishes that the informant fell within the first classification of § 29-2262.01. In this respect, the newly discovered evidence is merely cumulative of the evidence available prior to trial. See *State v. French*, 200 Neb. 137, 262 N.W.2d 711 (1978). The new evidence is not material. See, *State v. Koch*, 224 Neb. 926, 402 N.W.2d 275 (1987) (finding that evidence offered in support of the motion was merely cumulative of evidence received during trial); *State v. Wycoff*, 180 Neb. 799, 146 N.W.2d 69 (1966).

Even if appellants brought forth evidence in their motions for new trial which demonstrated that the informant fell within § 29-2262.01, appellants failed to exercise reasonable diligence to discover and produce relevant evidence prior to trial. On March 17, 1993, during a pretrial hearing which was held in chambers, appellants' counsel raised the issue of whether the evidence derived from the informant fell within § 29-2262.01. At that time, the county attorney acknowledged that the informant had been on probation at the time he provided information to the police.

Despite assurances from the county attorney that the informant did not otherwise fall within the class of persons described in § 29-2262.01, the district court stated that during a later suppression hearing it would allow appellants' counsel to question those officers who had direct contact with the informant to determine whether § 29-2262.01 applied to the cases. The district court stated, however, that it would not permit appellants' counsel to learn the identity of the informant.

At the suppression hearing, appellants' counsel was permitted to question two officers who had been in contact with the informant. Sergeant Topil of the Sarpy County sheriff's

office testified first. The following relevant testimony was elicited by appellants' counsel from Topil:

Q. Did you participate in obtaining a search warrant for the property at 1703 Pelton Avenue and 2704 Calhoun?

A. Yes, I did.

Q. How did this all start?

A. The 12th of January, 1993, I received information from a captain at the sheriff's office that a party had information on two houses in the Bellevue area that were growing marijuana and selling the product.

Q. Were you aware of the criminal history of the gentleman?

MR. WELLMAN [county attorney]: Object; relevance, materiality.

THE COURT: Overruled. The answer would be yes or no.

A. Yes, I did.

Q. What was that?

MR. WELLMAN: Object; relevance and materiality.

THE COURT: Sustained.

MR. ARPS [appellants' counsel]: To shorten this up, Judge, if I ask any further questions, is the county attorney going to make the same objection? Like whether this person —

THE COURT: You can ask him if he was on probation, the person that he talked to.

Q. (By Mr. Arps) Was he on probation?

. . . .

A. Yes, he was on probation.

Q. For what?

MR. WELLMAN: Object; relevance and materiality.

THE COURT: Sustained.

Q. (By Mr. Arps) Was he paid?

A. No, he was not.

Q. Any prior information from this individual?

A. I had not received any information from him prior.

Q. Was he in jail?

MR. WELLMAN: Object; relevance and materiality.

THE COURT: Overruled. Calls for a yes or no answer.

A. No, he was not.
Q. Were you told how this knowledge was acquired?
MR. WELLMAN: Yes or no.
A. No.
Q. Is this person a drug user?
MR. WELLMAN: Object; relevance and materiality.
THE COURT: Sustained.
Q. (By Mr. Arps) Is this person a drug purchaser?
MR. WELLMAN: Object; relevance and materiality.
THE COURT: Sustained.
Q. (By Mr. Arps) The date of this information was on the 12th?
THE COURT: The basis for sustaining these is not the legal basis, but our in camera conference that was held.
MR. WELLMAN: All right.

Appellants' counsel did not ask any more questions with regard to whether the informant may have been an undercover agent or employee of a law enforcement agency. The remaining examination of Topil concerned what the Sarpy County sheriff's office did with the information provided by the informant.

Appellants' counsel again had an opportunity to elicit information which may have indicated that the informant was acting as an undercover agent or employee of a law enforcement agency when Deputy Sheriff Scott of the Sarpy County sheriff's office testified. During that testimony, the following exchange occurred:

Q. [appellants' counsel] Okay. When did you first start this investigation?
A. It was on — around January 12th, '93.
Q. And that's when you got a tip, right?
A. Yes.
Q. Did you know who anonymous was?
A. Yes.
Q. Was he on probation?
A. I believe that was confirmed later on, yes.
Q. Was he on parole?
MR. WELLMAN: Object; relevance, materiality.
THE COURT: Sustained for purposes of the in camera

proceeding.

Q. (By Mr. Arps) How many times did you talk to him?

A. I talked to him once.

Q. And when was that?

MR. WELLMAN: Object; relevance, materiality.

THE COURT: Overruled.

A. It was around about I believe the 14th. It was within a couple of days after Investigator Topil had received a tip.

Q. Where?

MR. WELLMAN: Object; relevance, materiality.

THE COURT: Sustained.

Q. (By Mr. Arps) Was he paid?

MR. WELLMAN: Object; relevance, materiality.

THE COURT: Sustained.

Q. (By Mr. Arps) Did he ever give you any prior information?

A. To me, no.

Q. Did he ever give you any indication how he acquired this knowledge?

MR. WELLMAN: Object; relevance, materiality.

THE COURT: Sustained.

Q. (By Mr. Arps) Was he a drug user?

MR. WELLMAN: Object; relevance, materiality.

THE COURT: Sustained.

Q. (By Mr. Arps) Drug purchaser?

MR. WELLMAN: Object; relevancy, materiality.

THE COURT: Sustained. All these are based on the in camera hearing.

MR. ARPS: Okay.

Q. (By Mr. Arps) Going back, in any event, you started an investigation, right?

A. Yes.

Appellants' counsel did not attempt to further question Scott regarding the informant's participation in the criminal investigation of appellants.

After thoroughly reviewing the in camera hearing and the subsequent testimony of the officers involved with the informant, we find that appellants' counsel failed to exercise reasonable diligence prior to trial to discover and produce

evidence which may have indicated that evidence derived from the informant was inadmissible pursuant to § 29-2262.01. Although the district court ordered that the identity of the informant was to be kept anonymous, the court did allow appellants' counsel an opportunity to question the officers regarding the informant's role in the investigation. The questions asked by appellants' counsel, however, demonstrate that counsel failed to take advantage of the opportunity to elicit evidence which may have indicated that § 29-2262.01 applied to this informant.

This court considered whether a party had exercised reasonable diligence in *State v. Jensen*, 238 Neb. 801, 472 N.W.2d 423 (1991). In *Jensen*, the defendant was arrested and charged with knowingly or intentionally possessing with the intent to manufacture, distribute, deliver, or dispense a controlled substance, to wit: cocaine, and with knowingly or intentionally possessing a controlled substance other than marijuana, to wit: methamphetamine. At trial, the county attorney introduced evidence that money found in the defendant's purse tested positive for cocaine residue. Subsequent to trial, defendant filed a motion for new trial based on newly discovered evidence: an affidavit from an expert which stated that he needed 10 days to test the money, that the tests conducted by the county attorney could have been contaminated, and that the results were inconclusive because any money pulled from general circulation could test positive. *Id.*

On appeal, there was disputed evidence regarding what happened prior to trial. This court, however, found that the district court was not clearly erroneous in accepting the county attorney's version of events. Based on that factual scenario, this court found that defense counsel failed to exercise reasonable diligence prior to trial. Specifically, defense counsel was given notice more than 4 weeks before trial that the county attorney would test the money. The county attorney also provided defense counsel with a reasonable opportunity to test the money. Defense counsel, however, never picked up the money to be tested. This court found that defense counsel failed to take advantage of the advance warning of expert testimony and the

opportunity to gather his own expert testimony. Thus, this court found that defense counsel failed to exercise reasonable diligence, and we affirmed the order of the district court overruling the motion for new trial. *Id.*

Similarly, in the instant case, appellants' counsel failed to take advantage of opportunities prior to trial to gather evidence relevant to determining whether the evidence derived from the informant was inadmissible pursuant to § 29-2262.01. It therefore cannot be said that appellants' counsel diligently pursued a reasonable course of action prior to trial. A motion for new trial based on newly discovered evidence is not a mechanism for parties to present evidence which may have been uncovered and produced prior to trial. It is important to emphasize that what those opportunities would have yielded is irrelevant to our decision; the salient factor in our analysis is the failure of appellants' counsel to fully utilize those opportunities. To hold otherwise would condone the lack of reasonable diligence which is expected and required of all parties prior to trial. See, also, *Hansl v. Creighton Univ.*, 243 Neb. 21, 497 N.W.2d 63 (1993) (finding that the moving party failed to exercise reasonable diligence in producing alleged "newly discovered evidence" prior to trial); *Miles v. Box Butte County*, 241 Neb. 588, 489 N.W.2d 829 (1992); *State v. Perez*, 235 Neb. 796, 457 N.W.2d 448 (1990); *State v. Costanzo*, 235 Neb. 126, 454 N.W.2d 283 (1990); *State v. Daly*, 227 Neb. 633, 418 N.W.2d 767 (1988); *State v. Munson*, 204 Neb. 814, 285 N.W.2d 703 (1979); *State v. Crawford*, 195 Neb. 181, 237 N.W.2d 140 (1976) (moving party failed to demonstrate reasonable diligence, and court stated that there appeared to be no reason why party could not have made an effort to uncover and produce the evidence prior to trial).

We therefore find that the district court did not abuse its discretion in overruling appellants' motions for new trial. The decisions of the district court are affirmed.

AFFIRMED.

WRIGHT, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. BRYLE EDWARD RADDEN, APPELLANT.
518 N.W.2d 143

Filed July 1, 1994. No. S-93-846.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Affirmed.

Carl I. Klekers for appellant.

Don Stenberg, Attorney General, and James A. Elworth for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, FAHRNBRUCH, and LANPHIER, JJ.

WHITE, J.

This appeal arises from the conviction of appellant, Bryle Edward Radden, for manufacturing a controlled substance: marijuana. Appellant was sentenced to 7 years' imprisonment.

Appellant's case is indistinguishable from the cases of appellant's codefendants, Charles Raymond McCormick and David Eugene Hall. The records in all three cases are virtually identical. Specifically, we note that there is no difference between the bills of exceptions and the pleadings and motions filed in each of the three cases. More importantly, the procedural problems discussed in *State v. McCormick and Hall, ante* p. 271, 518 N.W.2d 133 (1994), are identical to those associated with this appeal. It is therefore unnecessary to restate the relevant facts and analysis in this opinion.

For the reasons set forth in *McCormick and Hall*, the only proceeding properly before this court for review is the motion for new trial based on newly discovered evidence filed by appellant on June 3, 1993. The decision of the district court overruling appellant's motion for new trial based on newly discovered evidence is affirmed.

AFFIRMED.

WRIGHT, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. JOHN J. JOUBERT, APPELLANT.

518 N.W.2d 887

Filed July 8, 1994. No. S-84-842.

1. **Death Penalty: Appeal and Error.** Neb. Rev. Stat. § 29-2525 (Reissue 1989) grants a prisoner convicted and sentenced to death an automatic appeal to the Nebraska Supreme Court, during which time Neb. Const. art. I, § 23, stays execution of the sentence until further order of this court.
2. **Death Penalty: Courts: Jurisdiction.** The Nebraska Supreme Court has the statutory authority to set an execution date once it has considered the prisoner's automatic appeal and determined that death is the legally appropriate sentence.
3. **Death Penalty: Courts: Warrants.** The failure to execute a death warrant on the original date fixed does not result in the discharge of a prisoner sentenced to die, but requires the Nebraska Supreme Court to fix a new date for the execution.
4. **Statutes.** Where the language of a statute is plain and unambiguous, no interpretation is needed, and a court is without authority to change such language.
5. _____. When the language used in a statute requires interpretation or may reasonably be considered ambiguous, the statute is open to construction.
6. **Criminal Law: Statutes.** Although a penal statute must be strictly construed, it is to be given a sensible construction, and general terms are to be limited in their construction and application so as to avoid injustice, oppression, or an absurd consequence.
7. **Statutes: Intent: Appeal and Error.** In construing a statute, an appellate court must look at the statutory objective to be accomplished, problem to be remedied, or purpose to be served, and then place on the statute a reasonable construction which best achieves its purpose, rather than a construction which will defeat the purpose.
8. **Statutes.** In construing a statute, a court must attempt to give effect to all of its parts, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless; it is not within the province of the court to read anything plain, direct, and unambiguous out of the statute.
9. _____. The language of a statute is to be considered in its plain, ordinary, and popular sense.
10. **Statutes: Legislature: Intent.** A series or collection of statutes pertaining to a certain subject matter, statutory components of acts which are in pari materia, may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of an act are consistent, harmonious, and sensible.
11. _____: _____: _____. In construing a statute, the legislative intention is to be determined from a general consideration of the whole act with reference to the subject matter to which it applies and the particular topic under which the language in question is found, and the intent as deduced from the whole will prevail over that of a particular part considered separately.
12. **Statutes: Legislature: Intent: Presumptions.** Generally, where a statute has been judicially construed and that construction has not evoked amendment, it will be presumed that the Legislature has acquiesced in the court's determination of its

intent.

13. **Courts: Words and Phrases.** The inherent judicial power of a court is that power which is essential to the court's existence, dignity, and functions.
14. **Constitutional Law: Courts.** Inherent judicial power is not derived from legislative grant or specific constitutional provision, but from the very fact that a court has been created and charged by the Constitution with certain duties and responsibilities.
15. _____: _____. Inherent judicial power is essential to the existence of a court and the orderly and efficient exercise of the administration of justice. Inherent judicial power exists in addition to the express grants of judicial power to each court and originates in the mandate of the Nebraska Constitution of the separation of powers between three coequal branches or departments of government.
16. **Courts.** Inherent judicial power arises from necessity where, in the absence of any previously established procedural rule, rights would be lost or a court would be unable to function.
17. _____. Through its inherent judicial power, the Nebraska Supreme Court has authority to do all things that are reasonably necessary for the proper administration of justice, whether any previous form of remedy has been granted or not.
18. **Courts: Jurisdiction.** A court that has jurisdiction to make a decision also has the power to enforce it by making such orders as are necessary to carry its judgment or decree into effect.
19. **Courts.** The primary duty of the courts is the proper and efficient administration of justice.
20. **Constitutional Law: Courts.** It is the duty of a court to see that justice is administered speedily, without delay, and legally, and in conformity to constitutional mandates.
21. **Courts.** A ministerial act may be completed by the Nebraska Supreme Court even after its mandate is issued because such act in no way involves a reconsideration of the judicial determination made.
22. **Courts: Judgments: Jurisdiction.** The jurisdiction of a court is not exhausted by the rendition of its judgment, but continues until that judgment shall be satisfied.
23. **Courts: Jurisdiction.** In order for an inferior court to reacquire jurisdiction, it must take action on the Nebraska Supreme Court's mandate.

Special appearance overruled. Motion for setting of execution date overruled without prejudice. Motion for sanctions overruled without prejudice.

Mark A. Weber, of Walentine, O'Toole, McQuillan & Gordon, for appellant.

Don Stenberg, Attorney General, and J. Kirk Brown for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ.

PER CURIAM.

Notwithstanding the existence of a stay issued by the U.S. District Court for the District of Nebraska, the plaintiff State, through its Attorney General, has moved this court to set still another date for executing the convicted prisoner, John J. Joubert. The prisoner has responded by filing a special appearance objecting to this court's jurisdiction over the matter and by filing a motion for sanctions, claiming that given the pendency of the federal stay, the Attorney General's motion is frivolous and vexatious. For the reasons hereinafter stated, the prisoner's special appearance is overruled, the Attorney General's motion is overruled without prejudice, and the prisoner's motion for sanctions is overruled without prejudice.

PART I

Upon pleading guilty, the prisoner was convicted in the district court of two counts of first degree murder and sentenced to death on each count. This court affirmed those sentences in *State v. Joubert*, 224 Neb. 411, 399 N.W.2d 237 (1986), and thereupon issued its mandate to the district court with the direction to "enter judgment in conformity with the judgment and opinion of this court." This court subsequently issued a warrant ordering that Joubert be put to death by passing an electric current through his body. That order of execution was stayed by the U.S. Supreme Court on Joubert's petition for a writ of certiorari. Upon the termination of that stay, this court issued a second death warrant. Upon Joubert's motion, this court itself later stayed that order of execution so that he might pursue his legislatively created proceeding for postconviction relief. When that quest proved unsuccessful, *State v. Joubert*, 235 Neb. 230, 455 N.W.2d 117 (1990), this court issued a third death warrant. That order of execution was again stayed by the U.S. Supreme Court on another petition by Joubert for a writ of certiorari. Upon the termination of that stay, this court issued the fourth death warrant, yet again ordering that Joubert be put to death. On July 3, 1991, the U.S. District Court for the District of Nebraska, upon Joubert's

petition for federal habeas corpus relief, entered an order staying "execution of [the] sentence" pending resolution of the petition. Joubert v. Hopkins, case No. 8:CV 91-00350.

PART II

This opinion concerns itself with the two issues presented by the Attorney General's motion and the prisoner's special appearance: whether this court has jurisdiction to entertain the Attorney General's motion and, if so, whether this court may set an execution date notwithstanding the federal stay of the "sentence."

1. JURISDICTION

There are two aspects to the prisoner's claim that this court lacks jurisdiction to entertain the Attorney General's motion: the contention that no court possesses jurisdiction to set successive execution dates and the position that even if such jurisdiction exists, this court has surrendered its jurisdiction to the district court.

Whether jurisdiction exists to entertain the Attorney General's motion in turn breaks down into two questions: whether there is a statutory basis for such jurisdiction and whether there is any other basis for such jurisdiction.

Because the Legislature has addressed the setting of execution dates in several statutes, we initially turn to those enactments for guidance in determining whether, upon appeal to this court, an execution date is properly set by this or the original sentencing court.

Neb. Rev. Stat. § 29-2543 (Supp. 1993) provides:

> Whenever any person has been tried and convicted before any district court in this state of a crime punishable by death and under the conviction has been sentenced by the court to suffer death, it shall be the duty of the clerk of the court before which the conviction was had to issue a warrant, under the seal of the court, reciting therein the conviction and sentence directed to the warden of the Nebraska Penal and Correctional Complex, commanding him or her to proceed at the time named in the sentence to carry the same into execution . . . .

However, Neb. Rev. Stat. § 29-2525 (Reissue 1989) grants a

prisoner convicted and sentenced to death an automatic appeal to this court, during which time Neb. Const. art. I, § 23, stays execution of the sentence until further order of this court. See *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881 (1977), *cert. denied* 434 U.S. 878, 98 S. Ct. 231, 54 L. Ed. 2d 158, *reh'g denied* 434 U.S. 961, 98 S. Ct. 496, 54 L. Ed. 2d 322.

Neb. Rev. Stat. § 29-2528 (Reissue 1989) further provides that after consideration of the appeal, this court shall "order the prisoner to be discharged, a new trial to be had, or appoint a day certain for the execution of the sentence."

Accordingly, there is no question that this court has the statutory jurisdiction to set an execution date once it has considered the prisoner's automatic appeal and determined that death is the legally appropriate sentence.

Neither is there any basis for an argument that no state court has the jurisdiction to reset an execution date once the initial date set has passed. Without regard to who has the duty of fixing the date, the failure to execute a death warrant on the original date fixed does not result in the discharge of a prisoner sentenced to die, but requires the court to fix a new date for the execution. In *Iron Bear v. Jones*, 149 Neb. 651, 658, 32 N.W.2d 125, 129 (1948), we said, " 'Where a defendant in a criminal action has been legally sentenced to death and has not been executed at the time fixed in the death warrant, he is not entitled to be discharged . . . but a new date for the execution may be fixed by the proper court.' " See, *Simmons v. Fenton*, 113 Neb. 768, 205 N.W. 296 (1925); *State v. Miller*, 169 Kan. 1, 217 P.2d 287 (1950).

The question, then, is whether this court has the statutory jurisdiction to set a new execution date upon the expiration of an earlier date it had set and to issue a warrant thereon. In these regards, the statutes are not entirely clear.

Neb. Rev. Stat. § 29-2544 (Reissue 1989), without giving direction as to who is to issue the document, provides that upon receipt of a death warrant fixing the execution date, the warden of the Nebraska Penal and Correctional Complex shall proceed at the time named in the warrant to carry out the sentence. In addition, Neb. Rev. Stat. § 29-2545 (Reissue 1989) provides that if a writ of error is granted and execution of the

proceedings is suspended, this court may thereafter issue a warrant commanding the warden to carry the sentence into execution at the time stated therein. However, with the exception of coram nobis, the 1972 amendment of Neb. Const. art. I, § 23, abolished writs of error and instead provided for review by appeal to this court. *In re Contempt of Liles*, 217 Neb. 414, 349 N.W.2d 377 (1984); *State v. Longmore*, 178 Neb. 509, 134 N.W.2d 66 (1965) (Legislature abolished writ of error in 1961).

It is true that where the language of a statute is plain and unambiguous, no interpretation is needed, and a court is without authority to change such language. *State v. Palmer*, 215 Neb. 273, 338 N.W.2d 281 (1983), *cert. denied* 484 U.S. 872, 108 S. Ct. 206, 98 L. Ed. 2d 157 (1987). But when the language used in a statute requires interpretation or may reasonably be considered ambiguous, the statute is open to construction. *Coleman v. Chadron State College*, 237 Neb. 491, 466 N.W.2d 526 (1991).

Although a penal statute must be strictly construed, it is to be given a sensible construction, and general terms are to be limited in their construction and application so as to avoid injustice, oppression, or an absurd consequence. See, *State v. Saulsbury*, 243 Neb. 227, 498 N.W.2d 338 (1993); *State v. Pierson*, 239 Neb. 350, 476 N.W.2d 544 (1991). Further, in construing a statute, an appellate court must look at the statutory objective to be accomplished, problem to be remedied, or purpose to be served, and then place on the statute a reasonable construction which best achieves its purpose, rather than a construction which will defeat the purpose. *Saulsbury, supra*; *State v. Seaman*, 237 Neb. 916, 468 N.W.2d 121 (1991). In construing a statute, the court must attempt to give effect to all of its parts, and if it can be avoided, no word, clause, or sentence will be rejected as superfluous or meaningless; it is not within the province of the court to read anything plain, direct, and unambiguous out of the statute. *State ex rel. Grams v. Beach*, 243 Neb. 126, 498 N.W.2d 83 (1993). The language of a statute is to be considered in its plain, ordinary, and popular sense. *Arizona Motor Speedway v. Hoppe*, 244 Neb. 316, 506 N.W.2d 699 (1993); *State ex rel.*

Grams, supra.

Moreover, a series or collection of statutes pertaining to a certain subject matter, statutory components of acts which are in pari materia, may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of an act are consistent, harmonious, and sensible. *AMISUB v. Board of Cty. Comrs. of Douglas Cty.*, 244 Neb. 657, 508 N.W.2d 827 (1993); *Arizona Motor Speedway, supra*; *State v. Escamilla*, 237 Neb. 647, 467 N.W.2d 59 (1991). Furthermore, in construing a statute, the legislative intention is to be determined from a general consideration of the whole act with reference to the subject matter to which it applies and the particular topic under which the language in question is found, and the intent as deduced from the whole will prevail over that of a particular part considered separately. *Neumeyer v. Omaha Public Power Dist.*, 188 Neb. 516, 198 N.W.2d 80 (1972).

By the time of the enactment of § 29-2545, the Legislature had already abolished most writs of error and provided that appeals under the criminal code would be the same as for civil cases. See *Longmore, supra.* We must therefore conclude that when read with the legislative purpose in mind, § 29-2545 grants this court jurisdiction to set an execution date and issue a warrant upon completion of an appeal.

Thus, when the foregoing statutes are read conjunctively, they provide that after appeal, this court sets an execution date. Further, under the provisions of §§ 29-2543 and 29-2545, this court has jurisdiction to set successive execution dates and issue warrants as may be needed to carry out the sentence.

In point of fact, this court has in the past set execution dates and issued death warrants in at least 14 appeals. Some of these cases involved setting execution dates numerous times during the appeal and postconviction process. E.g., *State v. Anderson*, S-42301; *State v. Harper*, S-43070; *State v. Hochstein*, S-42302; *State v. Holtan*, S-40638; *State v. Joubert*, S-84-842; *State v. Moore*, S-43557; *State v. Otey*, S-42204; *State v. Palmer*, S-84-733; *State v. Peery*, S-40967; *State v. Reeves*, S-81-706; *State v. Rust*, S-40451; *State v. Ryan*, S-86-946; *State v. Victor*, S-88-982; *State v. Williams*, S-42235. And in *Otey v. State*, 240 Neb. 813, 485 N.W.2d 153 (1992), we instructed that as this

court had issued the death warrant which had been stayed, further application for a death warrant should be filed with this court.

Generally, where a statute has been judicially construed and that construction has not evoked amendment, it will be presumed that the Legislature has acquiesced in the court's determination of its intent. *Erspamer Advertising Co. v. Dept. of Labor*, 214 Neb. 68, 333 N.W.2d 646 (1983). See, also, *State, ex rel. Case Threshing Machine Co., v. Marsh*, 117 Neb. 832, 223 N.W. 126 (1929); *State, ex rel. Village of Dakota City, v. Bryan*, 112 Neb. 692, 200 N.W. 870 (1924); *State, ex rel. Western Bridge & Construction Co., v. Marsh*, 111 Neb. 185, 196 N.W. 130 (1923); *Douglas County v. Vinsonhaler*, 82 Neb. 810, 118 N.W. 1058 (1908) (it is one of principles governing interpretation and construction of statutes that where meaning of statute is dubious, long usage is just medium by which to expound it).

The contention that this court needs separate statutory or other authority to issue a death warrant in addition to the authority to set an execution date overlooks that the death warrant in this context is nothing more than an extension of the setting of a date. Thus, no separate authority to issue a warrant is required. See, *State v. Armstrong*, 45 Or. 25, 74 P. 1025 (1904) (once death warrant issued, subsequent death warrant not needed); *Commonwealth v. Hill*, 185 Pa. 385, 39 A. 1055 (1898); *Hopkinson v. State*, 704 P.2d 1323 (Wyo. 1985), *cert. denied* 474 U.S. 1026, 106 S. Ct. 582, 88 L. Ed. 2d 564.

It should also be noted that even in the absence of such statutory jurisdiction, this court possesses the inherent judicial power to set successive execution dates and issue death warrants. The inherent judicial power of a court is that power which is essential to the court's existence, dignity, and functions. See *In re Integration of Nebraska State Bar Ass'n*, 133 Neb. 283, 275 N.W. 265 (1937). Such power is not derived from legislative grant or specific constitutional provision, but from the very fact that this court has been created and charged by the Constitution with certain duties and responsibilities. See *id.* See, also, *Eichelberger v. Eichelberger*, 582 S.W.2d 395 (Tex. 1979). Accordingly, the Legislature cannot limit the exercise of

inherent judicial power, such being essential to the existence of the court and the orderly and efficient exercise of the administration of justice. Inherent judicial power exists in addition to the express grants of judicial power to each court and originates in the mandate of the Nebraska Constitution of the separation of powers between three coequal branches, or departments, of government. *State, ex rel. Ralston, v. Turner*, 141 Neb. 556, 4 N.W.2d 302 (1942). See, Neb. Const. art. II, § 1; *Beard v. N.C. State Bar*, 320 N.C. 126, 357 S.E.2d 694 (1987).

In addressing the nature of inherent power of the courts in *In re Integration of Nebraska State Bar Ass'n*, we wrote:

> The Constitution does not, by any express grant, vest the power to define and regulate the practice of law in any of the three departments of government. In the absence of an express grant of this power to any one of the three departments, it must be exercised by the department to which it naturally belongs because "It is a fundamental principle of constitutional law that each department of government, whether federal or state, 'has, without any express grant, the inherent right to accomplish all *objects naturally within the orbit of that department*, not expressly limited by the fact of the existence of a similar power elsewhere or the express limitations in the Constitution.' . . ."

(Emphasis in original.) 133 Neb. at 285, 275 N.W. at 266.

The power arises from necessity where, in the absence of any previously established procedural rule, rights would be lost or the court would be unable to function. *Cottle v. Superior Court (Oxnard Shores Co.)*, 3 Cal. App. 4th 1367, 5 Cal. Rptr. 2d 882 (1992).

This court has recognized the inherent power of courts in many cases and circumstances, e.g., *Christianson v. Educational Serv. Unit No. 16*, 243 Neb. 553, 501 N.W.2d 281 (1993) (inherent power to dismiss action for disobedience of court order); *Schuessler v. Benchmark Mktg. & Consulting*, 243 Neb. 425, 500 N.W.2d 529 (1993) (courts inherently possess power to stay civil proceedings when required by interests of justice); *In re Interest of D.A.*, 239 Neb. 264, 475 N.W.2d 511

(1991) (within inherent power of court to appoint guardian ad litem in absence of statutory requirements); *State Farm Mut. Auto. Ins. Co. v. Royal Ins. Co.*, 222 Neb. 13, 382 N.W.2d 2 (1986) (allowance of attorney fees made pursuant to inherent power of court); *Creager v. Creager*, 219 Neb. 760, 366 N.W.2d 414 (1985) (inherent power to continue court's jurisdiction over alimony judgment to avoid inequitable results); *Kirby v. Liska*, 214 Neb. 356, 334 N.W.2d 179 (1983) (courts have authority to monitor and determine reasonableness of contingent fee contract under inherent power to regulate the bar); *State ex rel. Partin v. Jensen*, 203 Neb. 441, 279 N.W.2d 120 (1979) (inherent power of court may be exercised as to bail, although not specifically vested by statute); *Kovarik v. County of Banner*, 192 Neb. 816, 224 N.W.2d 761 (1975) (inherent power to appoint counsel to represent indigent misdemeanant); *Roach v. Roach*, 192 Neb. 268, 220 N.W.2d 27 (1974) (court has inherent power to retain jurisdiction to determine amounts due and enforce its judgment); *State, ex rel. Ralston, supra* (inherent power to regulate conduct and qualifications of attorneys); and *In re Integration of Nebraska State Bar Ass'n, supra* (inherent power to promulgate rules providing for integration of bar of state).

Through its inherent judicial power, this court has authority to do all things that are reasonably necessary for the proper administration of justice, whether any previous form of remedy has been granted or not. *In re Integration of Nebraska State Bar Ass'n, supra*. See, *Kovarik, supra*; *Beard, supra*. A court that has jurisdiction to make a decision also has the power to enforce it by making such orders as are necessary to carry its judgment or decree into effect. *State ex rel. Brubaker v. Pritchard, Judge, etc.*, 236 Ind. 222, 138 N.E.2d 233 (1956); *State ex rel. Watkins v. Land and Timber Company, Limited*, 106 La. 621, 31 So. 172 (1902); *State ex rel. Martin v. Superior Court*, 101 Wash. 81, 172 P. 257 (1918). Contra *Dexter & Carpenter v. Kunglig Jarnvagsstyrelsen*, 43 F.2d 705 (2d Cir. 1930), *cert. denied* 282 U.S. 896, 51 S. Ct. 181, 75 L. Ed. 789 (1931).

Neb. Const. art. V, § 2, vests this court with, among other things, "such appellate jurisdiction as may be provided by law"

and requires that the judges of this court hear and determine all appeals "involving capital cases." As noted earlier, § 29-2525 grants a prisoner sentenced to death an automatic appeal to this court, during which period the sentence is constitutionally stayed. Thus, the only question is whether the setting of successive execution dates is necessary to the administration of justice so as to fall within the scope of inherent powers.

Courts in other jurisdictions have answered affirmatively, holding that setting an execution date is within the courts' inherent powers necessary to allow them to enforce their own judgments. *State v. Miller*, 169 Kan. 1, 217 P.2d 287 (1950) (once state supreme court affirmed death sentence on appeal and entered order setting execution date, was within court's inherent authority to enforce judgment and order); *Williams v. Moore*, 262 F.2d 335 (5th Cir. 1959), *cert. denied* 360 U.S. 911, 79 S. Ct. 1297, 3 L. Ed. 2d 1261. In *Williams*, much like the situation presented here, no statutory authority existed for the court to set a new date after the expiration of the stay. See, *Upshaw v. State*, 350 So. 2d 1358 (Miss. 1977) (inherent power of court to prescribe rules of procedure for cases involving death penalty); *Beck v. State*, 396 So. 2d 645 (Ala. 1980).

The primary duty of the courts is the proper and efficient administration of justice. *In re Integration of Nebraska State Bar Ass'n*, 133 Neb. 283, 275 N.W. 265 (1937). See, also, *In Matter of Richards*, 333 Mo. 907, 63 S.W.2d 672 (1933). Likewise, it is the duty of a court to see that justice is administered speedily, without delay, and legally, and in conformity to constitutional mandates. *Knox County Council v. State ex rel. McCormick*, 217 Ind. 493, 29 N.E.2d 405 (1940). See, *People v. Felella*, 131 Ill. 2d 525, 546 N.E.2d 492 (1989) (judicial power includes adjudication and application of law, administration of courts, and imposition of criminal sentences); *State v. Wilkins*, 220 Kan. 735, 556 P.2d 424 (1976) (trial court has inherent power to enforce its own orders).

Accordingly, this court has the inherent power, as well as the statutory power, to set successive execution dates and issue death warrants as the circumstances may dictate.

It is urged, however, that once the mandate of this court issued, the court no longer retained jurisdiction; rather,

jurisdiction was returned to the district court in order that it might enter judgment in accordance with the mandate. See, *State v. Horr*, 232 Neb. 380, 441 N.W.2d 139 (1989); *Rehn v. Bingaman*, 152 Neb. 171, 40 N.W.2d 673 (1950); *State Bank of Beaver Crossing v. Mackley*, 118 Neb. 734, 226 N.W. 318 (1929) (when some action was taken by district court upon mandate, that court acquired exclusive jurisdiction of cause).

But *Rehn* notes that a ministerial act may be completed by this court even after its mandate is issued because such act "in no way involves a reconsideration of the judicial determinations made." 152 Neb. at 177, 40 N.W.2d at 677 (award of costs which is part of judgment awarded could be corrected after issuance of mandate and without its recall and even after district court has taken action on mandate). See *State v. Blankenfeld*, 228 Neb. 611, 423 N.W.2d 479 (1988) (where county court's judgment and sentence appealed to district court and to this court, which remanded upon affirmance to district court, district court was not required to remand to county court for performance of ministerial task of enforcing order of this court). Because the setting of an execution date has been uniformly held to be a ministerial and not a judicial act, this court retains the authority to set an execution date. See, *Pate v. State*, 393 P.2d 247 (Okla. Crim. 1964); *Ex parte Grayson*, 86 Okla. Crim. 86, 187 P.2d 232 (1948); *Rose v. Commonwealth*, 189 Va. 771, 55 S.E.2d 33 (1949). See, also, *Iron Bear v. Jones*, 149 Neb. 651, 32 N.W.2d 125 (1948) (time designated by court for executing sentence of death is not part of sentence; it is simply order prescribing time when sentence shall take effect); *In re Cross*, 146 U.S. 271, 13 S. Ct. 109, 36 L. Ed. 969 (1892); *Schwab v. Berggren*, 143 U.S. 442, 12 S. Ct. 525, 36 L. Ed. 218 (1892).

It has "long been settled that, 'The jurisdiction of a court is not exhausted by the rendition of its judgment, but continues until that judgment shall be satisfied.' " *Williams*, 262 F.2d at 338 n.4. See *Anderson v. State*, 267 So. 2d 8 (Fla. 1972) (where supreme court originally obtained jurisdiction of certain criminal cases because each was capital case, court would retain jurisdiction for all purposes until final disposition of case). Contra *State ex rel. Vance v. Hatten*, 508 S.W.2d 625 (Tex.

Crim. App. 1974) (once criminal court of appeals has acquired jurisdiction, it is only by judgment of that court that jurisdiction over case is restored to lower court, which acquires jurisdiction of case only to see that judgment of criminal court of appeals is carried out). Thus, this court retains jurisdiction to set an execution date and issue a death warrant notwithstanding the issuance of a mandate to the inferior court.

Moreover, in order for the inferior court to reacquire jurisdiction, it must take action on this court's mandate. Here, Neb. Rev. Stat. § 29-2522 (Reissue 1989) prevented the district court from setting an execution date "until after the conclusion of the appeal provided for by section 29-2525." This court's mandate did not direct the district court to set an execution date, and we find nothing in the record which demonstrates that the district court undertook to do so. Consequently, the issuance of this court's mandate did not surrender its jurisdiction to the district court.

2. Exercise of Jurisdiction

The Attorney General contends in the brief for appellee that notwithstanding the pendency of the federal court stay, this court may and should set an execution date in the future so as to provide the federal court with a deadline within which to adjudicate the matter before it. He concedes, however, that if the federal court fails to meet such a deadline, the State would be powerless to prepare for and to carry out the sentence.

A prisoner who has been sentenced to death has two separate avenues of review by the federal courts. If a federal question is involved, a prisoner sentenced to death may seek review by the U.S. Supreme Court by petitioning that court for a writ of certiorari. *Barefoot v. Estelle*, 463 U.S. 880, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 (1983), *reh'g denied* 464 U.S. 874, 104 S. Ct. 209, 78 L. Ed. 2d 185. In addition, Congress has provided for federal review via habeas corpus. Not only is a stay permitted in the event of a direct appeal, 28 U.S.C. § 2101(f) (1988), but 28 U.S.C. § 2251 (1988) provides that once a federal stay has been granted in a habeas corpus action, any proceeding in any state court or by or under any state authority shall be void. See, also, U.S. Sup. Ct. R. 23; Fed. R. Crim. P. 38; 8th Cir. R. 8A.

In *Rogers v. Peck*, 199 U.S. 425, 436, 26 S. Ct. 87, 50 L. Ed. 256 (1905), the U.S. Supreme Court, in speaking of U.S. Comp. Stat. § 766 (1901), the predecessor to § 2251 (see *In re Strauss*, 126 F. 327 (1903)), said:

> Statutes should be given a reasonable construction with a view to make effectual the legislative intent in their enactment. The object of this statute is apparent. It requires the state courts and authorities to make no order and entertain no proceeding which shall interfere with the full examination and final judgment in a *habeas corpus* proceeding in the Federal courts . . . .

See, *Louie Yung v. Coleman*, 5 F. Supp. 702 (D. Idaho 1934) (state authorities and courts are prevented by this statute from making any order or entering any proceedings which shall interfere with full determination and final judgment in habeas corpus proceeding pending in federal court); *Rogers, supra* (statute aims to entirely prevent action which shall interfere with perfect freedom of federal courts to inquire into case and make such orders and render such judgment as they shall see fit).

In like vein, in *In re Shibuya Jugiro*, 140 U.S. 291, 295, 11 S. Ct. 770, 35 L. Ed. 510 (1891), the U.S. Supreme Court had written:

> Of the object of the statute there can be no doubt. It was—in cases where the applicant was held in custody under the authority of a state court or by the authority of a State—to stay the hands of such court or State, while the question as to whether his detention was in violation of the Constitution, laws or treaties of the United States was being examined by the courts of the Union having jurisdiction in the premises. But the jurisdiction of the state court in the cases specified is restrained only pending the proceedings in the courts of the United States, and until final judgment therein.

In accord are the decisions of *United States v. Shipp*, 203 U.S. 563, 27 S. Ct. 165, 51 L. Ed. 319 (1906), and *United States v. Brown*, 281 F. 657 (8th Cir. 1922). In *Shipp*, the prisoner, who had been sentenced to death for a rape, presented a petition for a writ of habeas corpus. After denial of the writ, he appealed to

the U.S. Supreme Court. The Court allowed the appeal and ordered that all proceedings against the prisoner be stayed and custody of the prisoner be retained pending the appeal. The sheriff and his deputies were informed of the Court's stay but conspired to break into the jail for the purpose of lynching and murdering the defendant. The U.S. Supreme Court declared:

> [T]he order suspended further proceedings by the State against the prisoner and required that he should be forthcoming to abide the further order of this court. It may be found that what created the mob and led to the crime was the unwillingness of its members to submit to the delay required for the trial of the appeal. From that to the intent to prevent that delay and the hearing of the appeal is a short step. If that step is taken the contempt is proved.

203 U.S. at 575.

Similarly, in *Brown*, after the prisoner had appealed to the U.S. Court of Appeals for the Eighth Circuit and while the appeal was pending, the county attorney, sheriff, and clerk of the district court were proceeding to "try, convict, and imprison the petitioner under the indictment in the case." 281 F. at 661. The Eighth Circuit Court stated that if the actions of the state proceeded to imprisonment pending the appeal, the power of the court to grant relief to the petitioner would have been impaired, if not destroyed. Thus, it had the power to protect and preserve its jurisdiction and to give effect to its jurisdiction unimpaired.

The Attorney General advises this court he "perceive[s] no tension between a stay of execution issued by a federal court and the establishment of a viable date of execution for a death-sentenced prisoner should that prisoner's last established execution date have passed as a result of a federal stay of execution." Brief for appellee at 13. In part, the Attorney General argues that the stay precludes only the execution of the prisoner, not the ministerial act of setting a date on which the execution is to be carried out. See *Pate v. Smith*, 393 P.2d 247 (Okla. Crim. 1964).

However, in *In re Ebanks*, 84 F. 311 (N.D. Cal. 1897), *aff'd sub nom., Ebanks v. Hale*, 168 U.S. 707, 18 S. Ct. 942, 42 L.

Ed. 1214, when, during the pendency of an appeal and stay, the state court made an order directing the warden to carry into execution the judgment convicting the prisoner of murder by inflicting upon him on a stated date the penalty of death, the federal court held that it necessarily followed from its grant of an appeal and the stay imposed upon all proceedings in the state court that the state's order was given without jurisdiction and was absolutely void. Moreover, if carried into effect, the federal court stated, the state's actions would deprive the prisoner of the right to have the judgment of that court in the matter of his petition for a writ of habeas corpus reviewed by the U.S. Supreme Court, a right guaranteed to him by the laws of the United States. See *Ex parte Martin*, 180 F. 209 (D. Or. 1910) (after issuance of writ, state court is wholly without authority to proceed further as against prisoner).

It has also been held that preparations by a state consisting of moving the prisoner from his cell on death row to a special holding area with the intent to carry out the death sentence promptly if the state's motion to vacate was granted are improper. *Smith v. Armontrout*, 825 F.2d 182 (8th Cir. 1987). The court in *Smith* held that the prisoner should not be subject to these " 'preparations' " until the habeas corpus petition was dismissed and the stay of execution finally dissolved. *Id.* at 184. See *Levine v. Torvik*, 986 F.2d 1506 (6th Cir. 1993), *cert. denied* ____ U.S. ____, 113 S. Ct. 3001, 125 L. Ed. 2d 694 (pursuant to § 2251 district court has authority to grant stay of all state court proceedings that have effect of defeating or impairing federal court's jurisdiction; stay is necessary to preserve status quo); *Jackson v. Justices of Superior Court of Mass.*, 423 F. Supp. 50 (D. Mass. 1976), *judgment vacated* 549 F.2d 215 (1st Cir. 1977), *cert. denied* 430 U.S. 975, 97 S. Ct. 1666, 52 L. Ed. 2d 370 (court has jurisdiction under § 2251 to stay state court proceedings where it is necessary to do so to prevent state from acting in manner which will render relief by federal court meaningless).

In *Bates v. Estelle*, 483 F. Supp. 224 (S.D. Tex. 1980), the court disposed of a similar argument that a stay did not reach purely ministerial or administrative acts of the court. Therein, the respondents, the director of the Texas Department of

Corrections and the sheriff, argued that the execution of a state court mandate is not a proceeding within the terms of § 2251 and could not be stayed pending a ruling on the petition. The court defined the respondents' argument as being, in effect, that Congress considered habeas corpus rights important enough to authorize federal courts to halt or even void state court proceedings but not to authorize federal courts to interfere with administrative and ministerial actions related to these proceedings. Characterizing the argument as untenable, the court held that the execution of a state court sentence was a proceeding in the sense that the federal district court had the power to stay the execution of its mandate calling for the habeas corpus petitioner's incarceration pending review of a habeas corpus petition.

To determine what constitutes a "proceeding . . . in any State court" for the purposes of § 2251, the *Bates* court turned to the construction given to similar language in the federal Anti-Injunction Act. See 28 U.S.C. § 2283 (1988). According to the U.S. Supreme Court, the term " 'proceedings in a State court' " in the Anti-Injunction Act " 'includes all steps taken or which may be taken in the state court or by its officers from the institution to the close of the final process.' " *Bates*, 483 F. Supp. at 227. See, *Hill v. Martin*, 296 U.S. 393, 56 S. Ct. 278, 80 L. Ed. 293 (1935) (stay of proceedings in any court of state applies alike to action by court and its ministerial officers; applies not only to execution issued on judgment, but to any proceeding supplemental or ancillary taken with view to making suit or judgment effective); *Leathe v. Thomas*, 97 F. 136 (7th Cir. 1899) (prohibition of statute extends not only to proceedings up to and including final judgments, but to entire proceedings from commencement of suit until execution); *American Ass'n v. Hurst*, 59 F. 1 (6th Cir. 1893) (act of executive officer of court done under color of its process is to be regarded as proceeding of that court); Black's Law Dictionary 1204 (6th ed. 1990) (term "proceeding" refers to "[r]egular and orderly progress in form of law, including all possible steps in an action from its commencement to execution of judgment . . . an act necessary to be done in order to obtain a given end").

While we agree that the purpose of a stay is to prevent a state

from doing an act which is challenged and may be declared unlawful in a pending proceeding, *In re Strauss*, 126 F. 327 (1903), we must reject the Attorney General's position that the setting of an execution date is exempted from the stay.

The setting of execution dates in anticipation of the termination of a stay clearly constitutes preparation for the carrying out of an execution, in violation of federal law. See *Clair v. Vasquez*, 827 F. Supp. 1465 (C.D. Cal. 1993) (seven jurisdictional challenges by state to stays of execution close to line between advocacy and frivolousness); *Smith v. State*, 145 So. 2d 688 (Miss. 1962) (affirmative action by state court on state's motion to have new date set for execution of death sentence precluded where justice of U.S. Supreme Court stayed execution of death sentence of defendant pending action of Court on defendant's petition for certiorari).

Thus, the Attorney General asks us not only to perform a useless act, he asks us to perform a lawless one. It appears he has overlooked that U.S. Const. art. VI subjects the State of Nebraska to the "Constitution, and the Laws of the United States" and that he has sworn not only to support the Constitution of this state, but that of the United States as well. Neb. Const. art. XV, § 1; Neb. Rev. Stat. § 7-104 (Reissue 1991).

It must be borne in mind that the "legal barriers that exist to preserve the individual's constitutional rights and protect against the unlawful execution of a death sentence" separate the unlawful killing by a person and the lawful killing by the state. *Mercer v. Armontrout*, 864 F.2d 1429, 1431 (8th Cir. 1988). "If the law is not given strict adherence, then we as a society are just as guilty of a heinous crime as the condemned felon." *Id.*

Concerns for finality to a state's judgments do not outweigh the absolute need to protect against the deprivation of an individual's constitutional rights which might invalidate his capital sentence. *Mercer, supra.*

PART III

We therefore hold that this court may not set an execution date anticipating the termination of a federal stay. The

prisoner's special appearance is overruled, and the Attorney General's motion is overruled without prejudice.

Although it is clear from the foregoing analysis that the Attorney General could have had no legitimate legal reason for moving for the setting of an execution date while a federal stay was pending, because this is the first time we have directly so held, we overrule, without prejudice, the prisoner's motion for sanctions.

SPECIAL APPEARANCE OVERRULED.
MOTION FOR SETTING OF EXECUTION DATE OVERRULED WITHOUT PREJUDICE.
MOTION FOR SANCTIONS OVERRULED WITHOUT PREJUDICE.

STATE OF NEBRASKA, APPELLEE, V. CHARLES JESS PALMER, ALSO KNOWN AS CHARLES TINSLEY, ALSO KNOWN AS J.R. KIRKPATRICK, APPELLANT.

518 N.W.2d 899

Filed July 8, 1994. No. S-84-733.

1. **Death Penalty: Warrants: Courts.** The Nebraska Supreme Court has the inherent power, as well as the statutory power, to set successive execution dates and issue death warrants as the circumstances may dictate.
2. **Death Penalty: Courts: Jurisdiction.** Where the original date set for execution has passed, and where there is no federal proceeding pending nor a stay of execution in effect, the Nebraska Supreme Court may set a new date for execution.
3. **Death Penalty: Records: Time.** In any capital case in which the State moves that an execution date be set, the Attorney General shall, at the time of filing such motion, file a signed statement under oath briefly outlining any activity which has taken place in any federal court, together with the date or dates thereof, and shall specifically state whether a stay of state proceedings has been issued or has

been sought by any party and, if so, when such was requested or issued. If a stay has been issued, the Attorney General shall attach a true copy thereof to the motion; if no stay is in effect, the Attorney General shall attach a true copy of a certificate or letter issued by the federal courts involved, stating that no stay is in effect. Further, the Attorney General shall, within 5 days, supplement the statement under oath so as to reflect any subsequent ruling relating to the status of any federal court stay.

Motion to set execution date. Motion sustained.

Gary L. Dolan, of Wolfe, Anderson, Hurd, Luers & Ahl, for appellant.

Don Stenberg, Attorney General, and J. Kirk Brown for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ.

PER CURIAM.

The appellant, Charles Jess Palmer, has been tried, convicted and sentenced to death three times for the felony murder of Eugene Zimmerman. *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986); *State v. Palmer*, 215 Neb. 273, 338 N.W.2d 281 (1983); *State v. Palmer*, 210 Neb. 206, 313 N.W.2d 648 (1981). Palmer was scheduled to be executed on July 6, 1987. However, before Palmer's sentence was carried out, his execution was stayed. On June 12, 1987, the Supreme Court of the United States stayed Palmer's execution pending the filing of a petition for writ of certiorari. That stay, by its own terms, automatically terminated on October 5, 1987, when the Supreme Court denied Palmer's petition for a writ of certiorari. Subsequently, Palmer pursued further litigation in the federal courts. Palmer v. Clarke, case No. CU 84-L-144 (D. Neb.). However, as of June 13, 1994, when the U.S. Supreme Court denied Palmer's petition seeking a writ of certiorari, Palmer no longer had any proceeding pending in the federal courts.

On January 4, 1994, more than 6 years after the last stay of execution expired, the Attorney General, acting on behalf of the appellee, the State of Nebraska, moved this court to set a new execution date for Palmer.

In response to that motion, and similar motions filed by the

State in *State v. Otey*, S-42204, and *State v. Joubert*, S-84-842, this court ordered the parties to brief and argue the following issues:

> (1) Whether, at the termination of all federal jurisdiction in this matter this Court or the sentencing trial court has jurisdiction to set an execution date;
>
> (2) Whether conceding that a federal stay of execution is in full force and effect this Court or any state court has the authority to either disregard or anticipate the expiration of federal jurisdiction by setting an execution date prior to that expiration;
>
> (3) Whether this Court or any state court is permitted by the doctrine of comity or otherwise, to set an execution date during the pendency of federal proceedings even though a stay of execution is not in effect.

Given that Palmer no longer has a stay of execution in effect or federal proceedings pending, the only issue now relevant to this motion is whether this court has jurisdiction to set an execution date after an earlier execution date has expired. In *State v. Joubert, ante* p. 287, 518 N.W.2d 887 (1994), issued contemporaneously, we addressed this issue in detail. There we held, "[T]his court has the inherent power, as well as the statutory power, to set successive execution dates and issue death warrants as the circumstances may dictate." *Id.* at 297, 518 N.W.2d at 895.

Setting executions where there is no legal impediment to the execution is, by law and this court's experience, a ministerial act done routinely in order to carry out the court's judgment. *State v. Joubert, supra.* As we demonstrated in *Joubert*, it has long been the practice of this court to set execution dates under the appropriate circumstances.

However, starting in 1993, the Attorney General began to request writs of execution when not appropriate, e.g., in circumstances where a stay was in effect or after a decision was rendered, but before a mandate was issued. The Attorney General has sought a writ of execution in a case where a stay was in effect, requesting that we anticipate the date and outcome of an expected decision. *State v. Joubert, supra.* What formerly had been routine and ministerial could not be handled

routinely. This court ordered further briefing to clarify the Attorney General's request and also, hopefully, to identify cases in which this court should and could act, such as the case at hand, and those in which it could not and should not act, such as *Joubert*. Unfortunately, the Attorney General's office presented almost identical briefs in factually and legally dissimilar cases. Here no federal case is pending. In *State v. Otey, post* p. 309, 518 N.W.2d 901 (1994), a federal case had been pending, but no mandate had been issued. Finally, in *Joubert*, a federal court had issued a stay of execution. The briefs of the Attorney General failed to recognize these dissimilarities and treated each case the same.

Moreover, the Attorney General failed to provide this court with an adequate factual record to support his motion. Of principal concern in these matters was the status of related federal court proceedings. Rather than providing this court with evidence, the Attorney General apparently expected us to rely upon bare allegations or predictions in briefs. In order to determine the status of pending federal court actions, this court was forced to procure the necessary information from federal court records. This created an additional delay. The Attorney General's failure to present pertinent facts and law made what had formerly been routine and ministerial, not routine and not ministerial.

Henceforth, in any capital case in which the State moves that an execution date be set, the Attorney General shall, at the time of filing such motion, file a signed statement under oath briefly outlining any activity which has taken place in any federal court, together with the date or dates thereof, and shall specifically state whether a stay of State proceedings has been issued or has been sought by any party and, if so, when such was requested or issued. If a stay has been issued, the Attorney General shall attach a true copy thereof to the motion; if no stay is in effect, the Attorney General shall attach a true copy of a certificate or letter issued by the federal courts involved, stating that no stay is in effect. Further, the Attorney General shall, within 5 days, supplement the statement under oath so as to reflect any subsequent ruling relating to the status of any federal court stay.

CONCLUSION

There are no federal stays of execution in force and effect for Palmer. We therefore sustain the State's motion to set an execution date for Palmer. We therefore direct that the Clerk of this court, pursuant to the provisions of Neb. Rev. Stat. § 29-2545 (Reissue 1989), issue her warrant, under the seal of this court, to the warden of the Nebraska State Penitentiary directing the execution of the sentence of death imposed upon Palmer to be carried out on the 16th day of September 1994, between the hours of 12:01 a.m. and 11:59 p.m. on said day, in the manner provided by Neb. Rev. Stat. § 29-2532 (Reissue 1989).

MOTION SUSTAINED.

STATE OF NEBRASKA, APPELLEE, V. HAROLD LAMONT OTEY, APPELLANT.

518 N.W.2d 901

Filed July 8, 1994. No. S-42204.

1. **Death Penalty: Warrants: Courts: Jurisdiction.** The Nebraska Supreme Court has both the statutory jurisdiction and the inherent judicial power to set a new execution date upon the expiration of an earlier execution date, and to issue a warrant thereon.
2. **Death Penalty: Records: Time.** In any capital case in which the State moves that an execution date be set, the Attorney General shall, at the time of filing such motion, file a signed statement under oath briefly outlining any activity which has taken place in any federal court, together with date or dates thereof, and shall specifically state whether a stay of state proceedings has been issued or has been sought by any party and, if so, when such was requested or issued. If a stay has been issued, the Attorney General shall attach a true copy thereof to the motion; if no stay is in effect, the Attorney General shall attach a true copy of a certificate or letter issued by the federal courts involved, stating that no stay is in effect. Further, the Attorney General shall, within 5 days, supplement the statement under oath so as to reflect any subsequent ruling relating to the status of any federal court stay.

Motion to set execution date. Motion sustained.

Shawn D. Renner, of Cline, Williams, Wright, Johnson & Oldfather, for appellant.

Don Stenberg, Attorney General, and J. Kirk Brown for appellee.

BOSLAUGH, WHITE, CAPORALE, FAHRNBRUCH, and LANPHIER, JJ., ENDACOTT, D.J., and RONIN, D.J., Retired.

PER CURIAM.

The State of Nebraska, through its Attorney General, has moved this court to set an execution date for convicted prisoner Harold Lamont Otey. We sustain the State's motion, and direct the Clerk of this court to issue her warrant to the warden of the Nebraska State Penitentiary directing the execution of Otey on the 2d day of September 1994, in the manner provided by statute.

STATEMENT OF CASE

Otey was convicted of first degree murder in the perpetration of a first degree sexual assault in the June 11, 1977, slaying of Jane McManus. In 1978, he was sentenced to death by the district court for Douglas County. Otey challenged his conviction and sentence in numerous state and federal proceedings, none of which has been ultimately successful on the merits.

In Otey's first state proceeding, a direct appeal, his conviction and sentence were affirmed by this court. See *State v. Otey*, 205 Neb. 90, 287 N.W.2d 36 (1979), *cert. denied* 446 U.S. 988, 100 S. Ct. 2974, 64 L. Ed. 2d 846 (1980).

Otey has twice been denied state postconviction relief by this court. See, *State v. Otey*, 236 Neb. 915, 464 N.W.2d 352 (1991), *cert. denied* 501 U.S. 1201, 111 S. Ct. 2279, 115 L. Ed. 2d 965; *State v. Otey*, 212 Neb. 103, 321 N.W.2d 453 (1982), *cert. denied* 459 U.S. 1080, 103 S. Ct. 502, 74 L. Ed. 2d 641. In a third postconviction motion, Otey claimed that Nebraska's reasonable doubt instruction was invalid. That claim was overruled by the state district court and was on appeal to this court when it was dismissed by stipulation of the parties following the U.S. Supreme Court's ruling in *Victor v. Nebraska*, ____ U.S. ____, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994).

Otey also challenged the results of a 1991 commutation

hearing before the Nebraska Board of Pardons in which that board refused to commute Otey's death sentence to life imprisonment. See *Otey v. State*, 240 Neb. 813, 485 N.W.2d 153 (1992). This court reversed a district court order enjoining the enforcement of Otey's death sentence, and ordered Otey's petition dismissed.

Otey has also had numerous proceedings in the federal courts. He had twice been denied federal habeas corpus relief at the time the State's motion to set an execution date was filed. See, *Otey v. Grammer*, 859 F.2d 575 (8th Cir. 1988), *cert. denied* 497 U.S. 1031, 110 S. Ct. 3288, 111 L. Ed. 2d 796 (1990); *Otey v. Hopkins*, 951 F.2d 354 (8th Cir. 1991), *cert. denied* 502 U.S. 1041, 112 S. Ct. 894, 116 L. Ed. 2d 797 (1992), *aff'g denial of motion to vacate*, 992 F.2d 871 (8th Cir. 1993).

In a third petition for a federal writ of habeas corpus, case No. 4:CV92-3239, filed on July 7, 1992, Otey raised issues related to the constitutionality of his commutation hearing before the Nebraska Board of Pardons. On July 30, the U.S. District Court for the District of Nebraska granted Otey a stay of execution, which was subsequently vacated on December 31, when the district court entered judgment for the respondent on all issues. The U.S. Court of Appeals for the Eighth Circuit affirmed the denial of habeas corpus relief. See *Otey v. Hopkins*, 5 F.3d 1125 (8th Cir. 1993). Otey subsequently filed a petition for a writ of certiorari to the U.S. Supreme Court.

Following the vacation of Otey's stay of execution by the federal district court, the State, on January 4, 1993, moved this court to set an execution date because there were no state or federal stays of execution prohibiting the enforcement of the sentence of death ordered imposed upon Otey in June 1978. That motion was superseded by a similar motion of September 27, 1993, which is now before this court. Similar motions also were filed by the State in *State v. Joubert*, S-84-842, and *State v. Palmer*, S-84-733.

On January 27, 1994, this court ordered the parties in all three cases to submit simultaneous briefs on certain issues related to the State's motion. Oral argument was had on May 17, at which time Otey's petition for a writ of certiorari remained pending before the U.S. Supreme Court. The Court

denied certiorari on June 27, thus terminating Otey's federal proceedings. See *Otey v. Hopkins*, ____ U.S. ____, 114 S. Ct. 2768, 129 L. Ed. 2d 881 (1994).

ANALYSIS

The issues briefed by the parties in response to the order of this court are (1) whether this court has jurisdiction to set an execution date for Otey, (2) whether this court may set an execution date while a federal stay of execution is in full force and effect, and (3) whether this court may set an execution date during the pendency of federal habeas corpus proceedings even though a federal stay of execution is not in force.

In *State v. Joubert, ante* p. 287, 518 N.W.2d 887 (1994), this court held that when a federal stay of execution is in full force and effect, this court does not have the authority to issue an execution warrant. Because Otey's federal proceedings have been terminated, the only issues before the court are whether Otey has a federal stay of execution in force and effect and whether the court has jurisdiction to set an execution date for Otey.

This court disposed of the issue of the court's jurisdiction to set an execution date in *Joubert, supra*. In that case, we held that the Nebraska Supreme Court has both the statutory jurisdiction and the inherent judicial power to set a new execution date upon the expiration of an earlier execution date, and to issue a warrant thereon. We adopt the rationale and holding of the court in *Joubert* and incorporate it by reference into this opinion.

To ensure that no federal stay of execution is presently in force for Otey, the Clerk of this court, at the direction of the court, made inquiry of the Clerk of the U.S. District Court for the District of Nebraska, the Clerk of the U.S. Court of Appeals for the Eighth Circuit, and the Clerk of the U.S. Supreme Court. Each of those courts has responded that there is no stay of execution in force and effect for Otey at this time. Copies of the responses from the three federal courts have been filed with the Clerk of this court.

There being no federal stay of execution in force and effect for Otey at the present time, there exists no legal impediment to

this court's setting an execution date for Otey.

We note that although the court on its own initiative determined the status of this prisoner as to any federal stays of execution, in the future this court will not assume the burden of obtaining such information. That duty will rest upon the Attorney General. See *State v. Palmer, ante* p. 305, 518 N.W.2d 899 (1994).

Henceforth, in any capital case in which the State moves that an execution date be set, the Attorney General shall, at the time of filing such motion, file a signed statement under oath briefly outlining any activity which has taken place in any federal court, together with date or dates thereof, and shall specifically state whether a stay of state proceedings has been issued or has been sought by any party and, if so, when such was requested or issued. If a stay has been issued, the Attorney General shall attach a true copy thereof to the motion; if no stay is in effect, the Attorney General shall attach a true copy of a certificate or letter issued by the federal courts involved, stating that no stay is in effect. Further, the Attorney General shall, within 5 days, supplement the statement under oath so as to reflect any subsequent ruling relating to the status of any federal court stay.

CONCLUSION

There are no federal stays of execution in force and effect for Otey. We therefore sustain the State's motion to set an execution date for Otey. We therefore direct that the Clerk of this court, pursuant to the provisions of Neb. Rev. Stat. § 29-2545 (Reissue 1989), issue her warrant, under the seal of this court, to the warden of the Nebraska State Penitentiary directing that the execution of the sentence of death imposed upon Otey be carried out on the 2d day of September 1994, between the hours of 12:01 a.m. and 11:59 p.m. on said day, in the manner provided by Neb. Rev. Stat. § 29-2532 (Reissue 1989).

MOTION SUSTAINED.

HASTINGS, C.J., and WRIGHT, J., not participating.

MICHAEL W. MANSKE, APPELLANT, V. DIANE M. MANSKE, NOW KNOWN AS DIANE M. MARTIN, APPELLEE.

518 N.W.2d 144

Filed July 8, 1994. No. S-92-831.

1. **Jurisdiction: Appeal and Error.** An appellate court acquires no jurisdiction unless the appellant has satisfied the requirements for appellate jurisdiction.
2. _____: _____. An appellate court, on its own motion, may examine and determine whether jurisdiction is lacking as the result of a procedural defect which prevents acquisition of appellate jurisdiction.
3. **Jurisdiction: Time: Appeal and Error.** Timeliness of an appeal is a jurisdictional necessity and may be raised by an appellate court sua sponte.
4. **Motions for New Trial: Time: Appeal and Error.** A timely motion for new trial suspends the time limit for filing a notice of appeal, until the motion for new trial has been disposed of by the court rendering the decision.
5. _____: _____: _____. An untimely motion for new trial is ineffectual, does not toll the time for perfection of an appeal, and does not extend or suspend the time limit for filing a notice of appeal.
6. **Motions for New Trial: Appeal and Error.** A motion for new trial shall not be a prerequisite to obtaining appellate review of any issue upon which the ruling of the trial court appears on the record.
7. **Courts: Judgments.** In civil cases, a court of general jurisdiction has inherent power to vacate or modify its own judgments at any time during the term at which they are rendered.
8. **Judgments: Time: Appeal and Error.** Where a second judgment in part contradicts an earlier judgment, the time for appeal from that portion of the second judgment which contradicts the earlier judgment, and that portion only, runs from the rendition of the second judgment.
9. **Appeal and Error.** Errors which are argued but not assigned will not be considered by an appellate court.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Affirmed in part, and in part dismissed.

Gary B. Randall, P.C., and Elizabeth Stuht Borchers, P.C., of Marks & Clare, for appellant.

Terrance A. Poppe, of Hecht, Sweet, Morrow, Poppe & Otte, P.C., for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ.

LANPHIER, J.

This is an appeal from two orders of the Lancaster County

District Court in a divorce action. The first order, dated July 30, 1992, modified a child support obligation set forth in a 1987 decree of dissolution. The second order, dated August 21, 1992, modified the July 30 order. The husband appeals both orders; however, he did not timely appeal the first order. A timely appeal was made of the second order. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Michael W. Manske and Diane M. Manske, now known as Diane M. Martin, were married approximately 7 years before their divorce in 1987. The marriage produced two children. The original decree ordered Michael Manske to pay a total of $260 per month in child support. On March 6, 1992, an action was brought by Martin in the district court to modify the decree. The court, having found a material change in the circumstances, modified the decree in a July 30, 1992, order to require Manske to pay a total of $729 per month in child support.

On August 11, 1992, Manske filed a "Combined Motion Re: Leave to File Post-Trial Motion Out of Time; Enlargement of Findings; New Trial; Notice of Hearing." The district court overruled the motion for new trial on August 21 and on the same date also modified the July 30 order, reducing the child support obligation of Manske to a total of $709 per month. On September 18, 1992, Manske filed a notice of appeal of both the July and August orders to the Nebraska Court of Appeals. Under our authority to regulate the caseloads of the appellate courts of this state, we removed the matter to this court.

ANALYSIS

JULY 30, 1992, ORDER

Jurisdiction is a prerequisite to this court's consideration of Manske's appeal. An appellate court acquires no jurisdiction unless the appellant has satisfied the requirements for appellate jurisdiction. *In re Interest of B.M.H.*, 233 Neb. 524, 446 N.W.2d 222 (1989). We must therefore examine whether jurisdiction exists to review the July 30, 1992, order of the district court from which Manske appeals. See Neb. Ct. R. of Prac. 7A(2) (rev. 1992). An appellate court, on its own motion,

may examine and determine whether jurisdiction is lacking as the result of a procedural defect which prevents acquisition of appellate jurisdiction. *Metrejean v. Gunter*, 240 Neb. 166, 481 N.W.2d 176 (1992); *Wicker v. Waldemath*, 238 Neb. 515, 471 N.W.2d 731 (1991). Timeliness of an appeal is a jurisdictional necessity and may be raised by an appellate court sua sponte. *In re Interest of J.A.*, 244 Neb. 919, 510 N.W.2d 68 (1994).

Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 1992) prescribes the time within which a notice of appeal must be filed to vest jurisdiction in this court:

> [P]roceedings to obtain a reversal, vacation, or modification of judgments and decrees rendered or final orders made by the district court . . . shall be by filing in the office of the clerk of the district court in which such judgment, decree, or final order was rendered, within thirty days after the rendition of such judgment or decree or the making of such final order, a notice of intention to prosecute such appeal signed by the appellant or appellants or his, her, or their attorney of record and . . . by depositing with the clerk of the district court the docket fee required by section 33-103.

Section 25-1912(2) then provides: "The running of the time for filing a notice of appeal shall be terminated as to all parties (a) by a motion for a new trial under section 25-1143 if such motion is filed by any party within ten days after the verdict, report, or decision was rendered . . . ." See, also, Neb. Rev. Stat. § 25-1143 (Reissue 1989) (an application for a new trial must be made within 10 days after the verdict or decision is rendered). As stated in *Metrejean v. Gunter*, 240 Neb. at 168, 481 N.W.2d at 177-78:

> "If a motion for new trial, authorized by law, has been filed within 10 days of a decision (see Neb. Rev. Stat. § 25-1143 . . . and § 25-1912(2)), the motion for new trial suspends the time limit for filing a notice of appeal. When the motion for new trial has been disposed of by the court rendering the decision, appellate jurisdiction is vested in the Supreme Court by compliance with the provisions prescribed by § 25-1912, i.e., timely notice of appeal and deposit of docket fee."

Manske's motion for new trial was filed August 11, 1992. Allowing for weekends, the 10-day period for filing such a motion expired on August 10, 1992. Hence, the motion for new trial was filed after the 10-day period statutorily allowed for filing a motion for new trial. An untimely motion for new trial is ineffectual, does not toll the time for perfection of an appeal, and does not extend or suspend the time limit for filing a notice of appeal. *Metrejean v. Gunter, supra*; *In re Interest of B.M.H., supra*. See, also, *Williams v. Gering Pub. Schools*, 236 Neb. 722, 463 N.W.2d 799 (1990) (motion for new trial not filed within the time constraints required by statute is a nullity and does not extend the time within which a notice of appeal may be filed). While § 25-1143 allows for filing of an untimely motion for new trial after the 10-day period if a party is unavoidably prevented from timely filing such motion, as Manske herein so alleged in his combined motion, such a filing outside the 10-day time limit would not, in any event, toll the 30-day appeal time of § 25-1912(1). See § 25-1912(2). Here, there was no appeal filed within 30 days of the July 30, 1992, order, and therefore, Manske's motion for new trial is a procedural nullity for the purposes of appellate review.

It does not matter that Manske's untimely motion for new trial was overruled, even though he withdrew his motion to file posttrial motions out of time. When a motion for new trial is filed out of time, the overruling thereof does not extend the time for appeal. *Ricketts v. Continental Nat. Bank*, 169 Neb. 809, 101 N.W.2d 153 (1960). As stated in *Ricketts*, " 'A motion for new trial not filed within time cannot form the basis for extension of the time within which an appeal can be taken.' " *Id.* at 813, 101 N.W.2d at 156-57.

Neb. Rev. Stat. § 25-1912.01(1) (Reissue 1989) provides: "A motion for a new trial shall not be a prerequisite to obtaining appellate review of any issue upon which the ruling of the trial court appears on the record." Pursuant to § 25-1912.01(1), an appellate court acquires jurisdiction, notwithstanding the absence of a motion for new trial, if the requirements of § 25-1912 have been satisfied for appellate review of a final order, decision, or verdict in the trial court. *Metrejean v. Gunter*, 240 Neb. 166, 481 N.W.2d 176 (1992); *In re Interest of*

B.M.H., 233 Neb. 524, 446 N.W.2d 222 (1989).

Without a timely motion for new trial, Manske had 30 days from July 30, 1992, to file his notice of appeal of the July 30 order. Manske filed his notice of appeal September 18, 1992, well beyond the statutorily mandated 30-day time limit.

Therefore, because Manske failed to comply with the requirements of § 25-1912 with respect to the July 30 order, this court has no jurisdiction to review that order, and Manske's appeal of such must be dismissed.

AUGUST 21, 1992, ORDER

The district court modified its July 30 order in an August 21 order. On August 21, the court modified the July 30 order by providing in pertinent part:

> [O]rder . . . dated 7-30-92, is modified to allow Petitioner a deduction in the guideline calculation "Exhibit 1" for health insurance in amount of $55.00 per month. Thereby modifying the amount of child support for two child [sic] from $729 per month to $709 and for on [sic] child reduced from $469 to $457. So ordered.

In civil cases, a court of general jurisdiction has inherent power to vacate or modify its own judgments at any time during the term at which they are rendered. *Russell v. Luevano*, 234 Neb. 581, 452 N.W.2d 43 (1990); *In re Estate of Weinberger*, 207 Neb. 711, 300 N.W.2d 818 (1981); *Barney v. Platte Valley Public Power and Irrigation District*, 147 Neb. 375, 23 N.W.2d 335 (1946). This action by the trial court prior to the termination of term may be either on the court's own motion or at the request of either party. *In re Estate of Weinberger, supra.*

The July 30 order was modified on August 21 by the district court, before the termination of term. Where a second judgment in part contradicts an earlier judgment, the time for appeal from that portion of the second judgment which contradicts the earlier judgment, and that portion only, runs from the rendition of the second judgment. *Federal Land Bank v. McElhose*, 222 Neb. 448, 384 N.W.2d 295 (1986). Manske's notice of appeal of the August 21 order was filed September 18, within the statutorily prescribed 30-day time limit. See § 25-1912. Thus, this court has appellate jurisdiction to review

that portion of the August 21 order which reduced Manske's child support obligation from $729 in the July 30 order to $709 total per month.

Errors which are argued but not assigned will not be considered by an appellate court. *In re Interest of B.M.*, 239 Neb. 292, 475 N.W.2d 909 (1991); *In re Interest of T.F.P.*, 237 Neb. 922, 468 N.W.2d 116 (1991). Manske neither assigned as error nor argued that the district court erred in reducing the child support obligation in the August 21 order. The errors assigned and argued address only the July 30 order. Therefore, the district court's order of August 21 will be affirmed.

CONCLUSION

Since the appeal of the Lancaster County District Court's order of July 30, 1992, was not timely filed, the appeal of that order is dismissed. Since Manske did not assign as error or discuss in his brief the reduction of the child support obligation in the August 21, 1992, order, that order is affirmed.

AFFIRMED IN PART, AND IN PART DISMISSED.

DONALD W. CRAWFORD, APPELLEE, V. DEPARTMENT OF MOTOR VEHICLES, AN ADMINISTRATIVE AGENCY OF THE STATE OF NEBRASKA, APPELLANT.

518 N.W.2d 148

Filed July 8, 1994. No. S-92-1086.

1. **Administrative Law: Pleadings: Appeal and Error.** When a petition instituting review pursuant to the Administrative Procedure Act is filed in the district court, the review by the district court shall be de novo on the record.
2. **Judgments: Final Orders: Appeal and Error.** The judgment rendered or final order made by the district court may be reversed, vacated, or modified by the Supreme Court or the Court of Appeals for errors appearing on the record.
3. _____: _____: _____. When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.

4. **Trial: Rules of Evidence: Expert Witnesses.** A witness may qualify as an expert by virtue of either formal training or actual practical experience in the field.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Affirmed.

Don Stenberg, Attorney General, and Paul N. Potadle for appellant.

Tim J. Kielty for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ.

LANPHIER, J.

Following an administrative hearing, the Nebraska Department of Motor Vehicles (Department) revoked Donald W. Crawford's driver's license on February 25, 1991, pursuant to the implied consent law. The arresting officer, who was not certified to administer the Intoxilyzer breath test, had observed the technician attempt to administer the test. The officer testified at the administrative hearing before the Department that Crawford unreasonably refused to submit to the Intoxilyzer test by pretending to blow into the machine. Crawford claimed medical conditions were the cause of the apparent refusal. Crawford appealed to the Douglas County District Court, which reversed the Department's order finding that the arresting officer was not qualified to give an opinion that Crawford unreasonably refused to submit to the breath test. The Department appealed to this court. We affirm the district court.

FACTUAL BACKGROUND

Appellee, Donald W. Crawford, was arrested November 5, 1991, by Officer David Baker for suspicion of operating a motor vehicle while under the influence of alcoholic liquor or drugs. At the Omaha police station, crime lab technician Donald Veys administered a breath test to Crawford using an Intoxilyzer 5000 machine to measure Crawford's blood alcohol content. Veys is certified and licensed to administer such a test pursuant to Neb. Rev. Stat. § 39-669.11 (Cum. Supp. 1990). Veys did not testify. Officer Baker, who is not certified to

administer the test, witnessed Veys' administration of the test to Crawford. Crawford blew into the machine four separate times, giving a partial but insufficient sample. Crawford was subsequently cited for refusal to take the test under Neb. Rev. Stat. § 39-669.15 (Reissue 1988). At an administrative hearing before the Department, Officer Baker rather than Veys testified that Crawford refused to cooperate. Crawford submitted medical testimony that he had conditions on the date of the test which would inhibit his ability to blow into the machine. The Department terminated Crawford's license. Crawford timely appealed to the district court, which, after a de novo review, reversed the Department's order. The Department timely appealed the district court's order to the Nebraska Court of Appeals. Under our authority to regulate the caseloads of the appellate courts of this state, we removed the matter to this court. We affirmed the order of the district court.

ASSIGNMENTS OF ERROR

Appellant, the Department, asserts that the district court erred (1) in determining that Officer Baker was not qualified to give an opinion as to whether Crawford was blowing into the Intoxilyzer properly and (2) in reversing the order of the Department in the absence of a finding of physical disability.

STANDARD OF REVIEW

When a petition instituting review pursuant to the Administrative Procedure Act is filed in the district court, the review by the district court shall be de novo on the record. Neb. Rev. Stat. § 84-917(5)(a) (Cum. Supp. 1992); *Lee v. Nebraska State Racing Comm.*, 245 Neb. 564, 513 N.W.2d 874 (1994). The judgment rendered or final order made by the district court may be reversed, vacated, or modified by the Supreme Court or the Court of Appeals for errors appearing on the record. Neb. Rev. Stat. § 84-918(3) (Cum. Supp. 1992); *Lynch v. Nebraska Dept. of Corr. Servs.*, 245 Neb. 603, 514 N.W.2d 310 (1994). When reviewing a judgment for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Lee v. Nebraska State Racing Comm., supra.*

ANALYSIS

A witness may qualify as an expert by virtue of either formal training or actual practical experience in the field. Neb. Rev. Stat. § 27-702 (Reissue 1989); *State v. Chambers*, 241 Neb. 66, 486 N.W.2d 481 (1992). The district court determined that Officer Baker was not qualified to offer his opinion as to whether or not Crawford blew into the Intoxilyzer machine properly. Officer Baker had never physically administered an Intoxilyzer 5000 test before, and he was not licensed to administer the test. Officer Baker did not physically administer the Intoxilyzer 5000 test to Crawford, although he was a witness. He had not read the Department's procedures for administering the test. Officer Baker had observed the administration of the Intoxilyzer 5000 test on only 10 occasions previously. We need not reach the question of whether Officer Baker was qualified as an expert witness. Under our standard of review, we affirm the judgment of the district court if there is competent evidence in the record to support the judgment. We find no errors appearing on the record which support the Department's contention that the district court erred in its judgment.

In its second assignment of error, the Department asserts that the district court erred in reversing its order in the absence of a finding of physical disability. Physical inability to perform a test may excuse conduct which might otherwise be treated as refusal. *State v. Clark*, 229 Neb. 103, 425 N.W.2d 347 (1988); *Jamros v. Jensen*, 221 Neb. 426, 377 N.W.2d 119 (1985). However, absent Officer Baker's opinion that Crawford blew into the Intoxilyzer improperly, there is no evidence that Crawford manifested an unwillingness to submit to the test. In the absence of evidence that Crawford's conduct constituted a refusal, the question of whether or not a physical disability was the cause of the alleged refusal is moot.

CONCLUSION

There being no errors which appear on the record, the order of the district court is affirmed.

AFFIRMED.

PAUL D. EVANS, SHAREHOLDER, ON BEHALF OF D & E COPIERS, INC., A NEBRASKA CORPORATION, APPELLEE, V. JON E. ENGELHARDT AND CHARLES R. DALTON, APPELLANTS.

518 N.W.2d 648

Filed July 8, 1994. No. S-92-1129.

1. **Equity: Appeal and Error.** In an appeal of an equitable action, the appellate court reviews the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court.
2. **Actions: Equity: Accounting: Appeal and Error.** A derivative action which seeks an accounting and the return of money is an equitable action. In an appeal of an equitable action, the appellate court reviews the facts de novo without reference to the findings of fact made by the trial court and reaches an independent conclusion.
3. **Corporations.** An officer or director of a corporation occupies a fiduciary relation toward the corporation and its stockholders, and is treated by the courts as a trustee.
4. **Proof.** The burden of proof is upon the party holding a confidential or fiduciary relationship to establish the fairness, adequacy, or equity of the transaction with the party with whom he holds such relation.
5. **Equity: Appeal and Error.** Where credible evidence is in conflict on a material issue of fact, an appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Affirmed.

Thom K. Cope, of Bailey, Polsky, Cope, Wood & Knapp, for appellants.

Mark J. Krieger, of Bowman & Krieger, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ.

WRIGHT, J.

This is a shareholder action brought by Paul D. Evans against Jon E. Engelhardt and Charles R. Dalton, the remaining two shareholders of D & E Copiers, Inc. (D & E Copiers). Evans alleged that Engelhardt and Dalton paid themselves unreasonable salaries after Evans left the corporation. The district court for Lancaster County held that Evans, on behalf of D & E Copiers, was entitled to a judgment

against Engelhardt and Dalton, jointly and severally, in the amount of $27,640.

SCOPE OF REVIEW

In an appeal of an equitable action, the appellate court reviews the factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court. *Latenser v. Intercessors of the Lamb, Inc.*, 245 Neb. 337, 513 N.W.2d 281 (1994).

FACTS

In 1986, Engelhardt and Dalton approached Evans with the suggestion that they form a corporation for the servicing of copy machines. In December 1986, 10,000 shares of stock with a par value of $1 per share were issued by the resulting corporation, D & E Copiers. Engelhardt and Dalton each invested $5,000 in D & E Copiers when the stock was issued. Following a meeting of the incorporators on December 10, 1986, Evans was issued a certificate from the corporation for 4,000 shares, which represented 40 percent of the stock in D & E Copiers. Engelhardt and Dalton owned 30 percent of the stock each. Dalton signed the minutes of the incorporators' meeting, which minutes showed that the consideration for Evans' shares was $4,000.

The parties operated the corporation in 1987, 1988, and the first 5 months of 1989. During that time, Evans was responsible for the day-to-day operations, while Engelhardt and Dalton acted primarily as capital investors who contributed their efforts only from time to time. Engelhardt and Dalton worked full time for another corporation known as D & E Technical Service, Inc. (Technical Service), which was a separate corporation involved in servicing and selling typewriters, dictation machines, and other equipment, but not the servicing or selling of copiers.

From 1986 through 1989, D & E Copiers made profit distributions to its shareholders in amounts proportionate to their percentage ownership of the shares: Evans, 40 percent; Dalton, 30 percent; and Engelhardt, 30 percent. D & E Copiers was a subchapter S corporation which passed its retained earnings to its shareholders for inclusion as income on the

individual shareholders' income tax returns. While Evans worked for D & E Copiers, he was the only shareholder who drew a salary.

On May 31, 1989, Evans resigned as president of D & E Copiers and left the employment of the corporation. He formed a corporation called Advanced Office Automation, Inc. (AOA). On June 27, AOA contracted with Engelhardt and Dalton to purchase all but a few of the assets of D & E Copiers. The agreement recited that D & E Copiers was a Nebraska business corporation wholly owned by Engelhardt, Dalton, and Evans, its only shareholders. According to the terms of the agreement, AOA promised to pay $1,000 for used copiers, $16,032 for the parts identified in an exhibit attached to the agreement, $2,721.36 for all Panasonic supplies, and $60,349.41 for all new equipment in D & E Copiers' inventory identified in an attached exhibit. AOA assumed the yearly maintenance contracts held by D & E Copiers. Only a small fraction of the parts inventory, toner, and paper supplies for copiers remained with D & E Copiers.

The agreement further provided that D & E Copiers would continue in business until December 31, 1989, at which time D & E Copiers would begin voluntary dissolution if AOA had made all payments as set forth in the agreement. Following dissolution, the proceeds would be paid to the individual stockholders as their interests appeared. The record is not clear as to when AOA made its final payment under the contract. However, when the payment was made, Engelhardt and Dalton did not take any action to voluntarily dissolve the corporation.

In July 1989, Engelhardt and Dalton voted themselves annual salaries of $15,000 each from D & E Copiers. At the time, both worked full time for Technical Service. After Evans left D & E Copiers, no distributions were made to any of the shareholders except the salaries of Engelhardt and Dalton. Neither Engelhardt nor Dalton could recall the reason for selecting $15,000 per year as the salary. Dalton said it was " 'just a number.' " Neither produced any written documentation or other evidence to substantiate any of the time or effort they claimed to have put forth on behalf of D & E Copiers after July 1989.

When Engelhardt and Dalton were in charge of D & E Copiers, the corporation paid a secretary $5,304 as a salary. During this period, the secretary answered the phone, did typing, and waited on customers for Technical Service, but she was paid exclusively by D & E Copiers.

ANALYSIS

We first consider the claim by Engelhardt and Dalton that Evans had no standing to bring a derivative action on behalf of D & E Copiers because he was not a shareholder. They rely upon Neb. Rev. Stat. § 21-2018 (Reissue 1991), which provides in part: "No corporation shall be permitted to issue stock except for an equivalent in money paid or labor done, or property actually received and applied to the purpose for which such corporation was created." They argue that since Evans did not give any value for the 4,000 shares issued to him, he did not comply with the requirements of § 21-2018 and, therefore, has no standing to bring a shareholder action.

When D & E Copiers was formed, Evans was issued a certificate for 4,000 shares. The minutes of the meeting of incorporators show that Evans' consideration for the shares of stock was $4,000. Section 21-2018 also provides that "[i]n the absence of fraud in the transaction, the judgment of the board of directors or the stockholders, as the case may be, as to the value of the consideration received for stock shall be conclusive." Here, the corporation was paid for the shares issued, and Evans' shares were validly issued. The fact that the 4,000 shares were issued to Evans instead of to another shareholder does not invalidate Evans' shares of stock.

During the operation of the corporation, Evans was recognized by Engelhardt and Dalton as an active shareholder and participant in the corporation until June 1989. Distributions from the corporation were based on the percentage of stock ownership. The corporation's income tax returns for 1986 through 1990 list Evans as a shareholder, and Evans' shareholder distributions were reported on a schedule K-1. Engelhardt and Dalton notified Evans of shareholders' and directors' meetings, which notice evidenced their acknowledgment of Evans as a shareholder of the corporation.

In *Frasier v. Trans-Western Land Corp.*, 210 Neb. 681, 316 N.W.2d 612 (1982), stockholders disputed whether certain stock issued to the Frasiers was issued without consideration and was therefore void. The trial court found that the stock was void because the Frasiers had not paid an equivalent in money, labor done, or property delivered to the corporation. We reversed the judgment and remanded the cause with directions, holding that the majority stockholders would not be permitted to claim that the Frasiers were not stockholders when the majority stockholders had participated and acquiesced in the manner in which the stock was issued to the Frasiers. We noted that the action was a suit between informed and consenting stockholders as opposed to creditors or uninformed stockholders. The rule that permits a corporation to declare the issuance of stock void is applied in one manner as it relates to creditors of the corporation and in a totally different manner as it relates to stockholders who participated in the issuing of the stock and who now seek to attack the manner in which the stock was issued to a particular stockholder.

Engelhardt and Dalton are not in a position to claim that Evans does not own 4,000 shares of D & E Copiers' stock, and we find that Evans is a shareholder and has standing to bring this action.

Engelhardt and Dalton next claim that the trial court erred in finding they had not proved that their salaries were reasonable. A derivative action which seeks an accounting and the return of money is an equitable action. In an appeal of an equitable action, the appellate court reviews the facts de novo without reference to the findings of fact made by the trial court and reaches an independent conclusion. *Latenser v. Intercessors of the Lamb, Inc.*, 245 Neb. 337, 513 N.W.2d 281 (1994); *Lanphier v. OPPD*, 227 Neb. 241, 417 N.W.2d 17 (1987).

An officer or director of a corporation occupies a fiduciary relation toward the corporation and its stockholders, and is treated by the courts as a trustee. *Rettinger v. Pierpont*, 145 Neb. 161, 15 N.W.2d 393 (1944). The burden of proof is upon the party holding a confidential or fiduciary relationship to establish the fairness, adequacy, or equity of the transaction with the party with whom he holds such relation. *Id.* It was the

burden of Engelhardt and Dalton to show that their salaries were reasonable.

The trial court did not err in finding that Engelhardt and Dalton failed to meet this burden. Engelhardt and Dalton held a board meeting to vote on their salaries after Evans left D & E Copiers. Engelhardt said he worked an average of 30 hours per week for D & E Copiers during the 3-month period after Evans left, although he was also employed full time with Technical Service. He was unable to document any of the time he spent on behalf of D & E Copiers. Engelhardt claimed that during the last 6 months of 1989, he sold supplies, did public relations with customers, completed inventory, and serviced one machine which had not been sold to AOA. He claimed that some of the salary was intended to cover additional work he was required to do after Evans left, but that the salary was also to make up for work Engelhardt had completed in the past.

Dalton did not provide documentation of the time he spent working for D & E Copiers between July 1989 and March 1990. He claimed he worked 20 to 25 hours per week while also working full time for Technical Service. He claimed that he priced the inventory, talked to customers, inspected the inventory, and assisted in preparing lawsuits. The inventorying was completed in June 1989, but Dalton did not begin drawing a salary until July 1989. Dalton claimed that salary was geared to cover activities done after Evans left.

Our review of the record convinces us that the trial court was correct in finding that Engelhardt's and Dalton's testimony as to the time spent working for D & E Copiers was not credible. Where credible evidence is in conflict on a material issue of fact, an appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Brtek v. Cihal*, 245 Neb. 756, 515 N.W.2d 628 (1994).

Engelhardt and Dalton did not prove the reasonableness of their compensation. Although they claim to have spent 20 to 30 hours each per week working for the corporation, the evidence shows there was little work left to be done because AOA had purchased the inventory and all service contracts from D & E Copiers. By the time Engelhardt and Dalton began drawing a

salary, D & E Copiers was not a large or complex business, and the corporation was to eventually dissolve.

Finally, Engelhardt and Dalton argue that the district court erred in finding they engaged in fraudulent transactions that were detrimental to D & E Copiers. The trial court found that by paying a secretary to complete work for Technical Service with D & E Copiers' funds, Engelhardt and Dalton caused damage to D & E Copiers in the amount of $5,304. We agree.

The trial court's total judgment of $27,640 was based upon $22,336 in salaries paid to Engelhardt and Dalton after Evans left D & E Copiers and $5,304 in salary paid to a secretary after Evans left D & E Copiers. We find no error in the trial court's determination, and we affirm the judgment of the trial court.

AFFIRMED.

AMY JAMES, APPELLEE, V. MARY DEAN HARVEY, IN HER OFFICIAL CAPACITY AS THE DIRECTOR OF SOCIAL SERVICES, ET AL., APPELLANTS.

518 N.W.2d 150

Filed July 8, 1994. No. S-93-180.

1. **Administrative Law: Judgments: Final Orders: Appeal and Error.** In an appeal under the Administrative Procedure Act, the appeal shall be taken in the manner provided by law for appeals in civil cases, and the judgment rendered or final order made by the district court may be reversed, vacated, or modified for errors appearing on the record.
2. **Trial: Appeal and Error.** The standard of review on a trial court's determination of a request for sanctions is whether the trial court abused its discretion.
3. **Administrative Law: Jurisdiction.** The filing of the petition and the service of summons are the two actions that are necessary to establish jurisdiction pursuant to the Administrative Procedure Act, Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 1987 & Cum. Supp. 1992).

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Affirmed.

Don Stenberg, Attorney General, and Royce N. Harper for appellants.

Margaret A. McDevitt, of Legal Services of Southeast Nebraska, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ.

WRIGHT, J.

Mary Dean Harvey, in her official capacity as Director of Social Services; the Department of Social Services; and the State of Nebraska (hereinafter collectively referred to as DSS) appeal from an order of the district court for Lancaster County which imposed a sanction upon DSS for failure to timely file the transcript of an agency hearing. The district court reversed DSS' denial of reimbursement for medical expenses incurred by Amy James, which denial was based on the fact that one of the doctors who treated James was suspended from participation in the medicaid program at the time he treated James. We affirm.

SCOPE OF REVIEW

In an appeal under the Administrative Procedure Act, the appeal shall be taken in the manner provided by law for appeals in civil cases, and the judgment rendered or final order made by the district court may be reversed, vacated, or modified for errors appearing on the record. See, Neb. Rev. Stat. § 84-918(3) (Cum. Supp. 1992); *Bell Fed. Credit Union v. Christianson*, 244 Neb. 267, 505 N.W.2d 710 (1993).

The standard of review on a trial court's determination of a request for sanctions is whether the trial court abused its discretion. *Paro v. Farm & Ranch Fertilizer*, 243 Neb. 390, 499 N.W.2d 535 (1993).

FACTS

On July 15, 1992, Amy James filed a petition for review in the district court for Lancaster County seeking reversal of an order issued by the Director of Social Services. The director's order affirmed a finding by DSS' medical service division that medicaid would not reimburse the hospital at which James was treated for medical expenses she incurred on September 4 and 5, 1991.

James alleged that she was eligible for medicaid assistance for medical services involving her unborn child and that she

received medical services in September 1991 after a miscarriage. One of the physicians who provided the care, Dr. Harold Thaut, was suspended from participation in the medicaid program from October 2, 1990, until June 2, 1992. The other physician involved and the hospital at which James was treated were not suspended from participation in the medicaid program.

The hospital billed James in the amount of $3,265.50 for medical services and supplies, and Thaut billed for his services separately. DSS determined that Thaut's involvement in James' care precluded medicaid reimbursement of the hospital under Nebraska medicaid regulations 471 Neb. Admin. Code, ch. 2, §§ 002.05C and 002.05D (1988). James claimed that she did not request Thaut's services and did not know that he was involved in her care until after he had performed surgery on her. She did not learn Thaut had been suspended from participation in the medicaid program until a hospital employee told her in January 1992.

James claimed that the expenses billed by the hospital were not performed or provided by Thaut. She alleged that DSS' decision was in excess of its statutory or regulatory authority; was unsupported by competent, material, and substantial evidence; and was arbitrary and capricious.

DSS generally denied the allegations in James' petition and filed a motion for leave to file the transcript out of time because DSS' reporters had an increased volume of work and were attempting to complete a backlog of cases. DSS was granted an extension until October 15, 1992.

On October 27, 1992, James moved the court for an order striking DSS' answer and entering default judgment because DSS had failed to file the transcript pursuant to Neb. Rev. Stat. § 84-917(4) (Cum. Supp. 1992). As a sanction, the district court reversed the decision of DSS' director. The court noted that the transcript of the proceedings before the agency had not been filed until October 28, the day after James filed her motion to strike. The court then taxed the costs of the action to DSS.

ASSIGNMENTS OF ERROR

On appeal, DSS claims the district court abused its discretion

in imposing the sanction for failure to file the transcript in the time required by statute and in considering the failure to timely file the transcript as jurisdictional.

ANALYSIS

We first address the question of jurisdiction. This assignment of error is without merit because the record shows that the district court did not treat the lateness of the transcript as a jurisdictional issue.

Section 84-917(2)(a) provides:

> Proceedings for review shall be instituted by filing a petition in the district court of the county where the action is taken within thirty days after the service of the final decision by the agency. . . . Summons shall be served within thirty days of the filing of the petition in the manner provided for service of a summons in a civil action.

The filing of the petition and the service of summons are the two actions that are necessary to establish jurisdiction pursuant to the Administrative Procedure Act, Neb. Rev. Stat. §§ 84-901 to 84-920 (Reissue 1987 & Cum. Supp. 1992). In *Maurer v. Weaver*, 213 Neb. 157, 328 N.W.2d 747 (1982), we held that the preparation and filing of a transcript under the Administrative Procedure Act was not jurisdictional. The current language in § 84-917 which addresses the time allowed for filing a transcript is nearly identical to the language which was applicable in *Maurer*, the exception being that the time allowed for filing a transcript has been expanded from 15 days to 30 days. Our holding that the filing of the transcript is not jurisdictional still applies, and the district court had jurisdiction to take action on James' petition even though DSS had not timely filed the transcript.

We next address whether the district court can reverse DSS' order as a sanction for the agency's failure to timely file the transcript. DSS argues that it had good cause for the delay and for requesting an extension because of the increased volume of pending work for the agency's reporters. DSS did not provide documentation, but stated that it was common knowledge that there had been an increasingly high volume of administrative

hearings before the director and a proportionate number of appeals to the district court.

Our review of a trial court's determination of sanctions is whether the trial court abused its discretion in imposing the sanctions. *Paro v. Farm & Ranch Fertilizer*, 243 Neb. 390, 499 N.W.2d 535 (1993). The U.S. Supreme Court has stated that an appellate court should apply an abuse of discretion standard in reviewing all aspects of a federal district court's determination of sanctions. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990). The standard was adopted by this court in *Millard v. Hyplains Dressed Beef*, 237 Neb. 907, 468 N.W.2d 124 (1991).

Here, the petition was filed July 15, 1992, and the transcript was not filed until more than 3 months later. Upon DSS' motion, the court granted the agency until October 15 to file the transcript. In its order, the court specifically excised a phrase which stated that the court had found good cause for the extension. When October 15 arrived and no transcript had been filed, James filed a motion asking the court to strike DSS' answer and enter a default judgment.

It is the duty of courts to prevent dilatory proceedings in the administration of justice. *Aetna Cas. & Surety Co. v. Dickinson*, 216 Neb. 660, 345 N.W.2d 8 (1984). In *Pressey v. State*, 173 Neb. 652, 114 N.W.2d 518 (1962), we recognized the inherent power of the court to dismiss an action for disobedience of a court order. However, in this situation it would be inequitable to dismiss the case because that would penalize James, the party seeking review of the agency's order. The district court stated at the hearing on James' motion to strike that this was the third or fourth case in the prior 3 months in which the filing of the transcript by DSS had been a problem. The court found that DSS' claim of an increased workload was not sufficient for the court to make a finding that good cause had been shown for an extension.

The transcript consisted of 23 pages of testimony and 21 exhibits which total less than 50 pages. DSS provided no rational explanation as to why it would take more than 3 months to produce the transcript. As the court noted, a sanction which would require DSS to pay the costs of preparing

the transcript would serve no purpose because the agency's employees prepare the transcript and because James was proceeding in forma pauperis. The court determined that the only sanction which would send a message to DSS concerning its dilatory practice was to reverse the agency's order.

In an action brought under the Administrative Procedure Act, it is the responsibility of the agency to provide the transcript in a timely fashion. The failure to do so subjects the agency to the disciplinary powers of the court. In the present case, we find that the district court did not abuse its discretion in reversing the agency's order.

The decision of the district court is affirmed.

AFFIRMED.

CAE VANGUARD, INC., A DELAWARE CORPORATION, APPELLEE, V. MAURICE NEWMAN, APPELLANT.

518 N.W.2d 652

Filed July 8, 1994. No. S-93-340.

1. **Actions: Injunction: Equity.** An action for injunction sounds in equity.
2. **Actions: Contracts: Reformation: Equity.** Reformation of a contract is an equity action.
3. **Equity: Appeal and Error.** In an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
4. **Restrictive Covenants: Courts: Reformation.** It is not the function of the courts to reform unreasonable covenants not to compete solely for the purpose of making them legally enforceable.
5. **Courts.** Private parties may not confer upon the court powers which it does not possess.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Reversed and remanded with direction.

Gary J. Nedved, of Bruckner, O'Gara, Keating, Hendry, Davis & Nedved, P.C., for appellant.

Michael L. Jeffrey, of Jeffrey, Hahn & Hemmerling, P.C., for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ.

BOSLAUGH, J.

The appellee, CAE Vanguard, Inc., filed a suit to enjoin the appellant, Maurice Newman, from violating the terms of a noncompetition agreement which was signed in conjunction with the sale of stock. Newman admits that he violated the agreement, but claims that the agreement is unenforceable.

Vanguard Pacific Metal Builders of Kentucky and VMB Company assigned their rights under the noncompetition agreement to CAE Vanguard, Inc. (the companies are hereinafter referred to collectively as Vanguard). Vanguard is in the business of rebuilding railroad car axles. The rebuilding process consists of either downsizing—the milling of a worn axle into a smaller axle—or brush plating—a process of electrochemically metalizing a worn axle such that it conforms to industry standards. Through the use of trade secrets developed for brush plating, Vanguard had become the largest railroad axle brush plater in North America, servicing 90 percent of the electrochemically metalized axles in the United States and Canada.

Newman worked as a plant manager for Vanguard and performed a variety of tasks, including development of shop procedures and pricing schedules, quality control, and sales. During his tenure with Vanguard, he acquired intimate knowledge of Vanguard's trade secrets and 10 percent of its stock.

Newman left Vanguard in 1989 and sold his stock to the other three stockholders. In conjunction with the sale and with benefit of legal counsel, Newman signed an agreement not to compete with Vanguard's business of brush plating railroad axles or to divulge trade secrets pertaining thereto. The provision in the covenant not to compete, in pertinent part,

states:

> Newman agrees and covenants that he will not, for a period of five (5) years after the date of this Covenant, and anywhere in the United States, the continent of North America, or anywhere else on earth, or such lesser period of time or geographical area restriction as a court of law might later determine to be the limits of enforceability of this covenant, (a) directly or indirectly solicit electrochemical metalizing business regarding railroad axles and/or mounted wheel sets . . . .

Newman argues that the covenant against competition in this case was designed not to eliminate just unfair competition, but was intended to eliminate all competition from Newman. As we said in *Chambers-Dobson, Inc. v. Squier*, 238 Neb. 748, 472 N.W.2d 391 (1991), a covenant may protect against competition by improper and unfair methods, but an employer is not entitled to enforce a covenant which merely protects against ordinary competition.

The agreement also contains the following paragraph:

> In the event that any portion of this Covenant may be held to be invalid or unenforceable for any reason, it is agreed that said invalidity or unenforceability shall not affect the other portions of this Covenant, and that the remaining covenants, terms and conditions or portions thereof shall remain in full force and effect and any court of competent jurisdiction may so modify the objectionable provision as to make it valid, reasonable and enforceable.

In the years following the stock sale agreement, Newman was unable to find employment in the railroad industry. In July 1991, he began purchasing equipment for the purpose of opening a shop which would brush plate railroad axles. He also divulged Vanguard's trade secrets to three individuals and contacted Vanguard's customers in an attempt to solicit business.

Vanguard filed a suit in the district court for Lancaster County seeking to enjoin Newman from violating the terms of the agreement. The trial court found that the covenant not to divulge information was reasonable as written. The trial court then found that the covenant not to compete was unreasonable

as written and reformed the agreement so that it would be enforceable. In reforming the agreement, the trial court struck from the covenant the words "or anywhere else on earth, or such lesser period of time or geographical area restriction as a court of law might later determine to be the limits of enforceability of this covenant." The court enjoined Newman from violating the reformed covenant.

Newman appeals from the ruling and asserts that the trial court erred (1) in reforming the covenant not to compete, (2) in enforcing the reformed covenant, and (3) in failing to find that the covenants constitute an unreasonable restraint of trade.

An action for injunction sounds in equity. *County of Dakota v. Worldwide Truck Parts & Metals*, 245 Neb. 196, 511 N.W.2d 769 (1994); *Village of Brady v. Melcher*, 243 Neb. 728, 502 N.W.2d 458 (1993). Reformation of a contract is also an equity action. *Ames v. George Victor Corp.*, 228 Neb. 675, 424 N.W.2d 106 (1988). In an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Whitehead Oil Co. v. City of Lincoln*, 245 Neb. 660, 515 N.W.2d 390 (1994); *County of Dakota v. Worldwide Truck Parts & Metals, supra*.

This court has never allowed reformation of a covenant not to compete. Previous cases have implied that, under certain circumstances, reformation would be allowed. For example, in *Polly v. Ray D. Hilderman & Co.*, 225 Neb. 662, 669, 407 N.W.2d 751, 756-57 (1987), we stated:

> In previous cases of this nature we have declined, for various reasons, to rewrite the covenant so as to make it "no greater than necessary." [Citations omitted.] We once again do not believe that this is a proper case for reformation of the covenant not to compete. . . . [The party seeking to reform the covenant] did not request reformation in its answer and cross-petition and did not argue that issue either at the trial court level or on appeal.

See, also, *Philip G. Johnson & Co. v. Salmen*, 211 Neb. 123, 317 N.W.2d 900 (1982).

Vanguard argues that reformation should be allowed in this case for three reasons. First, Vanguard notes that the agreement was formed in conjunction with the sale of a business interest, rather than with an employment contract. "[C]ourts have generally been more willing to uphold promises to refrain from competition made in connection with sales of good will than those made in connection with contracts of employment." Restatement (Second) of Contracts § 188, comment *b.* at 42 (1981). Second, Vanguard notes that both parties to the agreement were represented by counsel and therefore had equal bargaining power. Vanguard's final argument, upon which the trial court relied, raises a question of first impression in this jurisdiction—whether parties can agree to allow a court to reform an unreasonable covenant. The courts that have addressed this question have not reached uniform results. See, generally, Annot., 61 A.L.R.3d 397 (1975).

Vanguard cites several decisions from other courts which reflect the recent trend to allow the modification of covenants not to compete regardless of whether the parties have agreed to such modification. The courts which have allowed the modification have either allowed modification by "blue penciling" or by the "rule of reasonableness." The "blue pencil" rule, which was followed by the trial court, allows a court to strike an unreasonable restriction from a covenant if, after its removal, the covenant remains grammatically meaningful. E.g. *Solari Industries, Inc. v. Malady*, 55 N.J. 571, 264 A.2d 53 (1970).

Most courts which have recently addressed the question have granted modification by the rule of reasonableness, which allows the court to fashion an agreement which reasonably protects the interests of the party seeking to enforce the covenant. E.g., *Data Management, Inc. v. Greene*, 757 P.2d 62 (Alaska 1988); *Central Adjustment Bureau, Inc. v. Ingram*, 678 S.W.2d 28 (Tenn. 1984); *Ehlers v. Iowa Warehouse Company*, 188 N.W.2d 368 (Iowa 1971), *modified* 190 N.W.2d 413. In a case which was factually similar to this case, the Supreme Court of Tennessee held that judicial modification of an unreasonable

covenant not to compete was justified, especially where the parties had agreed to such modification. *Central Adjustment Bureau, Inc. v. Ingram, supra.*

A minority of the courts which have addressed the question have held that courts may not revise an agreement so as to make it enforceable. These courts have reasoned that reformation is tantamount to the construction of a private agreement and that the construction of private agreements is not within the power of the courts. See, *Rollins Protective Svcs. Co. v. Palermo*, 249 Ga. 138, 287 S.E.2d 546 (1982); *Rector-Phillips-Morse v. Vroman*, 253 Ark. 750, 489 S.W.2d 1 (1973).

We find the minority view the most reasonable view and the view which is most in harmony with existing precedent. In *Vlasin v. Len Johnson & Co.*, 235 Neb. 450, 455, 455 N.W.2d 772, 776 (1990), we stated that "[i]t is not the function of the courts to reform unreasonable covenants not to compete solely for the purpose of making them legally enforceable." The provision of the agreement which states that a court may reform the covenant is of no effect. Private parties may not confer upon the court powers which it does not possess. *Rector-Phillips-Morse v. Vroman, supra.* This court has stated repeatedly that courts may not rewrite a contract for parties. *Metropolitan Life Ins. Co. v. Beaty*, 242 Neb. 169, 493 N.W.2d 627 (1993); *Husen v. Husen*, 241 Neb. 10, 487 N.W.2d 269 (1992).

Because we find that the covenant is not subject to modification, we must either enforce it as written or not enforce it at all. The trial court found as a matter of law that the covenant not to compete was unenforceable as written. That finding was not challenged, and we let it stand.

Accordingly, we reverse the judgment of the trial court and remand the cause, directing the trial court to enter an order consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTION.

KIMBERLY K. RATH, APPELLANT, V. SELECTION RESEARCH, INC., APPELLEE.

519 N.W.2d 503

Filed July 15, 1994. No. S-92-991.

1. **Summary Judgment.** Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** On appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom judgment was granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Summary Judgment: Records: Depositions: Appeal and Error.** In order to receive consideration on appeal, depositions used on a motion for summary judgment must have been offered into evidence in the trial court and preserved in and made part of the bill of exceptions.
4. **Contracts: Statute of Frauds: Time: Words and Phrases.** For purposes of the statute of frauds, a contract "not to be performed within one year" is one which by its terms cannot be performed within 1 year.
5. **Summary Judgment: Proof.** The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Reversed and remanded for further proceedings.

Christopher J. Connolly, of Olds, Pieper & Connolly, and Arch Stokes and Maggie Stokes, of Stokes & Murphy, for appellant.

Roger P. Cox and Gregory D. Barton, of Harding & Ogborn, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ.

WHITE, J.

Following her termination from employment, Kimberly K. Rath sued her employer, Selection Research, Inc. (SRI), for negligent misrepresentation, breach of an implied contract, and breach of an implied covenant of good faith and fair dealing. Rath also sought a declaratory judgment, alleging that a

noncompetition agreement that she had signed was void as a matter of law. The district court granted summary judgment to SRI on all issues except the declaratory judgment. Rath appealed to the Nebraska Court of Appeals from that summary judgment. Under our authority to regulate the caseloads of the appellate courts of this state, we removed the matter to this court. We reverse the judgment and remand the cause for further proceedings.

Rath began working for SRI on a part-time basis while she was in college. After her graduation from college in the spring of 1983, Rath began working for SRI full time. The terms of Rath's full-time employment are the subject of the present appeal and will be discussed more fully in conjunction with our analysis.

In 1986, Rath married another SRI employee. In March 1989, according to Rath's petition, Dr. Donald O. Clifton (founder, president, and chairman of the board of SRI) informed Rath's husband that his employment would be terminated on May 31, 1989. In April 1989, also according to the petition, Rath's primary supervisor, Dr. Mick Zangari, told Rath that her employment could continue despite her husband's termination.

On May 31, 1989, Rath's husband filed a lawsuit naming SRI as defendant. On June 2, Rath alleges, Clifton and Zangari fired Rath for lack of loyalty, stating that a loyal employee would have informed the company of an impending lawsuit.

On June 14, Rath filed suit against SRI. After Rath had filed two amended petitions, SRI filed an answer and counterclaim, and Rath responded with a reply and answer. SRI then filed a motion for summary judgment. Before a hearing on the summary judgment motion, Rath filed a third amended petition, which SRI answered. The parties have stipulated that the motion for summary judgment should be decided with respect to the third amended petition.

On June 15, 1992, at the first hearing on SRI's motion for summary judgment, both parties submitted evidence and Rath requested a continuance, which was granted. On July 29, at the second hearing, Rath submitted supplemental exhibits. SRI objected to the exhibits and also filed a motion to strike the

exhibits.

On September 29, Rath filed a "response" to SRI's objection and motion to strike. The response consists of a 30-page brief, extensive deposition testimony, and the accompanying deposition exhibits.

Also on September 29, the district court granted SRI's motion for summary judgment. The court found that Rath's employment contract was either for 50 years or until age 65, that the contract could not be performed within 1 year, and therefore that Rath's claims based on her employment contract were barred by the statute of frauds. The court found that Rath had failed to produce any written memoranda which would satisfy the writing requirement of the statute of frauds. The court dismissed all of Rath's claims except for the declaratory judgment and sustained SRI's motion to strike to the extent that the evidence objected to was parol evidence.

Rath has assigned five errors, which in sum assert that the district court erred in granting summary judgment to SRI. Summary judgment is proper when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Carpender v. Bendorf, ante* p. 77, 516 N.W.2d 619 (1994); *Horvath v. M.S.P. Resources, Inc., ante* p. 67, 517 N.W.2d 89 (1994). On appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom judgment was granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Carpender, supra*; *Horvath, supra*.

Since the perfection of this appeal, additional motions have been filed in this court. We reserved rulings on two of these motions: SRI's motion to strike Rath's response of September 29, 1992, and SRI's supplemental motion to strike those portions of Rath's appellate briefs which cite the material contained in Rath's response. Before addressing the merits of this appeal, we first dispose of the pending motions.

In moving to strike Rath's response of September 29, and any references thereto, SRI argues that the addenda to the response—the depositions and accompanying exhibits—are

not a part of the appellate record. We agree.

In order to receive consideration on appeal, depositions used on a motion for summary judgment must have been offered into evidence in the trial court and preserved in and made part of the bill of exceptions. See *Brown v. Shamberg*, 190 Neb. 171, 206 N.W.2d 846 (1973). See, also, *DeCosta Sporting Goods, Inc. v. Kirkland*, 210 Neb. 815, 316 N.W.2d 772 (1982) (corresponding rule for affidavits). The evidence Rath wants us to consider was never offered or entered into evidence in the trial court and was never made a part of the bill of exceptions. Instead, Rath simply filed her response of September 29 after the hearing on the motion for summary judgment and attached to that response the voluminous depositions of Rath and her husband.

Rath contends that her response of September 29 constitutes a pleading filed in the court and that the depositions were filed as a part of the pleading. By statute, the only pleadings allowed are the petition by the plaintiff, the answer or demurrer by the defendant, the demurrer or reply by the plaintiff, and the demurrer to the reply by the defendant. Neb. Rev. Stat. § 25-803 (Reissue 1989). Rath has provided us with no authority, and we are aware of none, which holds that a response to a motion is a permissible pleading.

We conclude that Rath's response is not a part of the appellate record. Therefore, the materials included in the response form no part of the basis for our decision.

Rath claims that her oral contract of employment could be performed within 1 year and thus was not void under the statute of frauds. The statute of frauds provides, in relevant part: "In the following cases every agreement shall be void, unless such agreement, or some note or memorandum thereof, be in writing, and subscribed by the party to be charged therewith: (1) Every agreement that, by its terms, is not to be performed within one year from the making thereof . . . ." Neb. Rev. Stat. § 36-202 (Reissue 1988).

A contract "not to be performed within one year" is one which by its terms cannot be performed within 1 year. *Johnson v. First Trust Co.*, 125 Neb. 26, 248 N.W. 815 (1933); *Grotte v. Rachman*, 114 Neb. 284, 207 N.W. 204 (1926); *Carter White*

Lead Co. v. Kinlin, 47 Neb. 409, 66 N.W. 536 (1896). See *Montgomery v. Quantum Labs, Inc.*, 198 Neb. 160, 251 N.W.2d 892 (1977). To state the rule in positive terms, an oral agreement is valid under the statute of frauds if it is capable of being performed within 1 year from the date of making.

To determine whether Rath's alleged oral contract of employment is capable of being performed within 1 year, we must determine the duration of the alleged contract. As to the duration of the alleged contract, the record is confusing at best. Throughout her pleadings, affidavits, and answers to interrogatories, Rath uses numerous terms to describe the duration of her alleged contract. According to Rath, the alleged contract was to last for her "lifetime," her "career," her "work lifetime," "50 years," and "until age 65." In addition to using a wide variety of terms, Rath also combines these terms in a variety of ways. For example, Rath alleges in her petition that SRI promised her "a 'lifetime' career at [SRI] until age 65," alleges in an affidavit that she was offered a "fifty year/lifetime contract," and alleges in answers to interrogatories that SRI made her a "fifty (50)-year/work lifetime commitment."

Rath argues that the alleged contract was for an indefinite period—her work lifetime. SRI argues that, accepting everything Rath alleges as true, the alleged contract was for a definite term—either until age 65 or 50 years. These two positions each yield a different result under the statute of frauds.

Under the statute of frauds, an oral employment contract with a work lifetime duration is valid. *Boothby v. Texon, Inc.*, 414 Mass. 468, 608 N.E.2d 1028 (1993) (oral contract for permanent employment is valid under statute of frauds); *Kestenbaum v. Pennzoil Co.*, 108 N.M. 20, 766 P.2d 280 (1988), *cert. denied* 490 U.S. 1109, 109 S. Ct. 3163, 104 L. Ed. 2d 1026 (1989) (oral contract for permanent employment is valid under statute of frauds); Restatement (Second) of Contracts § 130, comment *a.*, illus. 2 (1981). See *Doherty v. Doherty Ins. Agency, Inc.*, 878 F.2d 546 (1st Cir. 1989) (contract to supply benefits for a partner's lifetime is valid under statute of frauds). But see *Zimmerman v. H.E. Butt Grocery Co.*, 932 F.2d 469 (5th Cir. 1991), *cert. denied* 502 U.S. 984, 112 S. Ct. 591, 116

L. Ed. 2d 615 (oral contract for permanent employment is barred by statute of frauds). Such a contract is valid because, in theory, the employee could die within 1 year. If the employee died within 1 year of making the contract, the employee would have worked and been employed for his lifetime, thus, both parties would have fully performed the contract. *Doherty, supra*; the Restatement, *supra*. The contract is therefore capable of performance within 1 year.

In contrast, unless an exception applies, an oral employment contract with a 50-year duration is void under the statute of frauds. See, *McBride v. City of McCook*, 212 Neb. 112, 321 N.W.2d 905 (1982) (oral employment contract for 18 months is void under the statute of frauds); *Montgomery, supra* (oral employment contract for 15 months is void under the statute of frauds). If the employee died within 1 year of making the 50-year contract, the contract would terminate and the parties would be excused from performance, but the contract would not have been fully performed. *Celi v. Canadian Occidental Petroleum Ltd.*, 804 F. Supp. 465 (E.D.N.Y. 1992) (termination of a contract as a result of its breach is not performance for purposes of statute of frauds); *Blue Valley Creamery Co. v. Consolidated Products Co.*, 81 F.2d 182 (8th Cir. 1936), *appeal after remand* 97 F.2d 182 (8th Cir. 1938), *cert. denied* 305 U.S. 629, 59 S. Ct. 93, 83 L. Ed. 403 (1938) (statute of frauds looks to the performance of the contract, not the defeat of the contract). See the Restatement, *supra* at comment *b.*, illus. 5. Thus, the 50-year employment contract is not capable of performance within 1 year. For similar reasons, an oral employment contract "until age 65" would be void under the statute of frauds. See, *Trum v. Melvin Pierce Marine Coating*, 562 So. 2d 235 (Ala. 1990); *Harris v. Arkansas Book Co.*, 287 Ark. 353, 700 S.W.2d 41 (1985); *Burton v. Atomic Workers Fed. Cr. Union*, 119 Idaho 17, 803 P.2d 518 (1990).

The district court determined that the contract between Rath and SRI was to last either until age 65 or for 50 years. In either case, the court reasoned, the contract was void under the statute of frauds. We find that the record is not sufficiently clear for the district court to have determined the duration of the contract; rather, the record presents a genuine issue of material fact as to the duration of the contract.

We recognize that this issue of fact is largely the result of Rath's failure to present her case in a consistent manner. However, SRI has failed to force Rath, through any procedural means, to choose from among the inconsistent facts which she has presented. Instead, SRI has been content to emphasize the favorable portions of the record.

The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law. *Young v. First United Bank of Bellevue, ante* p. 43, 516 N.W.2d 256 (1994); *Katskee v. Blue Cross/Blue Shield*, 245 Neb. 808, 515 N.W.2d 645 (1994). As a result of SRI's failure to pin Rath down to any one version of the facts, SRI has failed to sustain its burden of demonstrating that there is no genuine issue of material fact. Having found that there is a genuine issue of material fact, it is unnecessary for us to consider Rath's alternative arguments.

The district court improperly granted summary judgment. The judgment of the district court is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

STATE OF NEBRASKA, APPELLEE, V. FREDERICK WHITE, APPELLANT.
518 N.W.2d 923

Filed July 15, 1994. No. S-92-1061.

1. **Constitutional Law: Effectiveness of Counsel: Proof.** To sustain a claim of ineffective assistance of counsel as a violation of the Sixth Amendment to the U.S. Constitution, the defendant must show that counsel's performance was deficient and that such deficient performance prejudiced the defense. The standard for determining the propriety of the claim is whether the attorney, in representing the defendant, performed at least as well as a lawyer with ordinary training and skill in the criminal law in the area. Further, the defendant must make a showing of how the defendant was prejudiced in the defense of his case as a result of his attorney's actions or inactions.

2. **Constitutional Law: Effectiveness of Counsel.** Defense counsel bears the primary responsibility for advising a defendant of his or her right to testify or not to testify, of the strategic implications of each choice, and that the choice is ultimately for the defendant to make.
3. **Constitutional Law: Effectiveness of Counsel: Proof.** To support a claim of ineffective assistance of counsel, the defendant must first show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.
4. **Effectiveness of Counsel: Appeal and Error.** A review of an ineffective assistance of counsel claim must be made from the perspective of defense counsel, taking into account all circumstances of the case as they were known to counsel at the time of the representation.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed.

Toney J. Redman for appellant.

Don Stenberg, Attorney General, and Delores Coe-Barbee for appellee.

Kenneth N. Thompson, amicus curiae.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, LANPHIER, and WRIGHT, JJ.

PER CURIAM.

Defendant, Frederick White, appeals from the order of the district court denying his motion for postconviction relief. The single assignment of error is that the district court found that defendant was not denied effective assistance of counsel when he was not given the opportunity to testify at his trial. This case has been transferred to the docket of the Supreme Court under our authority to regulate the caseloads of the appellate courts. We affirm.

Defendant was charged with the August 17, 1979, felony offense of escape from official detention, a violation of Neb. Rev. Stat. § 28-912 (Reissue 1989). His first trial, to a jury, commenced March 4, 1980, and resulted in a conviction, but the conviction was set aside and defendant was granted a new

trial because of an erroneous instruction. The second trial began April 16, 1980, and again resulted in a conviction. Defendant was represented by the Lancaster County Public Defender, Dennis Keefe, at both trials. On appeal to this court, defendant having cited grounds for error other than ineffective assistance of counsel, his conviction was affirmed. See *State v. White*, 209 Neb. 218, 306 N.W.2d 906 (1981). Defendant's amended motion for postconviction relief was filed by his court-appointed attorney, Toney J. Redman, which motion alleged ineffective assistance of counsel by defendant's lawyer at the second trial.

It is beyond dispute that to sustain a claim of ineffective assistance of counsel as a violation of the Sixth Amendment to the U.S. Constitution, the defendant must show that counsel's performance was deficient and that such deficient performance prejudiced the defense. The standard for determining the propriety of the claim is whether the attorney, in representing the defendant, performed at least as well as a lawyer with ordinary training and skill in the criminal law in the area. Further, the defendant must make a showing of how the defendant was prejudiced in the defense of his case as a result of his attorney's actions or inactions. *State v. Nielsen*, 243 Neb. 202, 498 N.W.2d 527 (1993).

The bases of defendant's claim of ineffective assistance of counsel were counsel's failure to pursue the legality of defendant's arrest and to appeal the issue, failure to appeal the issue of the constitutionality of § 28-912, failure to object to or appeal the issue of improper closing statements by the prosecution, and failure to advise defendant of his right to testify in the second jury trial.

The postconviction trial court, in a well-reasoned and detailed order, denied each of defendant's specific complaints with a full explanation of each. The only complaint which defendant argues on appeal is counsel's failure to advise defendant of his right to testify. Therefore, we confine our analysis to that issue.

On August 17, 1979, an Officer Spanel of the Lincoln Police Department was investigating a series of sexual assaults in a Lincoln neighborhood. The officer was in plain clothes and in

an unmarked car. He walked up to defendant and one Julius Nivens to show them a composite sketch of the sexual assault suspect. As defendant reached out his right hand to take the sketch, the officer noted a series of distinctive scars on defendant's right forearm. Aside from the fact that the suspect was a black male, which defendant was, the suspect was reported to have scars on his left forearm.

According to Spanel, he told defendant that defendant was coming downtown with him. Spanel reached into his car to radio in to headquarters, and defendant struck him and ran. Defendant contends that the officer never identified himself and never placed defendant under arrest. Defendant was subsequently arrested and charged with escape.

The first trial commenced March 4, 1980, and the following appears of record after the close of the State's evidence:

> Mr. Keefe: Mr. White and I have talked at length prior to the trial, this weekend and last week, about the fact that he does have the right to testify, and also the fact that he has the right not to testify, if he doesn't want to. My advice to him is that as a tactical maneuver that we would—that he not testify, nor do we call a witness by the name of Julius Nivens. And those are tactical considerations on my part and my advice has been to him that neither he testify nor do we call Mr. Nivens as a witness. Is that agreeable with you, Fred?
>
> The Defendant: Yes.

The second trial commenced April 16, 1980, and the record of that trial does not disclose any similar statement made by defense counsel or defendant. Defendant was not called as a witness. It is counsel's failure to call defendant as a witness or obtain a waiver from defendant that defendant now claims was error on trial counsel's part.

Just before the beginning of the second trial, defendant, his counsel, and counsel for the State appeared before the court in response to a motion by the State to endorse an additional witness. The following exchange took place:

> The Court: This is the matter of the State of Nebraska versus Fred White. Mr. McGinn, who do you wish to endorse? I don't see it here.

Mr. McGinn: I filed it more than a week ago.

The Court: Who do you wish to endorse?

Mr. McGinn: I filed it on April 9th, and it asks leave of Court to endorse Officer Stan Chalis of the Lincoln Police Department as a witness in the above-entitled case. The motion went on to say that the State showed the Court that Officer Chalis would offer testimony regarding a prior similar act of escape committed by the defendant, Fred White. It's my understanding that it is likely that intent will become an issue in this case, of course, depending on the Court's Instructions, and if it does, certainly evidence of prior similar crimes is relevant to show—

. . . .

Mr. Keefe: It was when the defendant was under charge and leaving the courtroom. Not a similar situation here. There is no intent. Mr. McGinn wants to introduce this simply to let the jury know that the defendant has been convicted of a felony. There is no theory on which this can be a prior—

. . . .

The Court: Well, I didn't anticipate this. We didn't get into it the last time. But I'm going to deny your request.

The case proceeded to trial, at which Nivens testified but defendant did not. Nothing appears of record which indicates whether defendant was to testify or whether he would waive his right to testify.

At the postconviction hearing and on appeal to this court, defendant argues simply that he was not given the opportunity to testify, that he wanted to testify, and that under *U.S. v. Teague*, 953 F.2d 1525 (11th Cir. 1992), a criminal defendant has a fundamental constitutional right to testify in his or her own behalf, which right is personal to the defendant and cannot be waived either by the trial court or by defense counsel. In the present case, counsel for defendant, in addressing the trial court before the taking of evidence in the postconviction proceedings, stated:

At the second trial, Mr. White tells me that the judge made a ruling before the trial, that evidence of that escape

could not be offered if Mr. White testified, and as a result, it was Mr. White's intention to testify at the second trial.

So, the argument would be, whatever occurred at the first trial, was irrelevant as far as advice given to Mr. White, because the facts were different, and the facts being different because the State at the second trial was no longer going to use evidence of the prior escape.

Teague holds that defense counsel bears the primary responsibility for advising a defendant of his or her right to testify or not to testify, of the strategic implications of each choice, and that the choice is ultimately for the defendant to make. *Teague* relies on *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), in deciding the case:

> In *Strickland*, the Supreme Court defined two requirements for a claim of ineffective assistance of counsel: "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687, 104 S.Ct. at 2064.
>
> The first prong of this test requires that defendant show that counsel's performance "fell below an objective standard of reasonableness." *Id.* at 688, 104 S.Ct. at 2065. Where the defendant claims a violation of his right to testify by defense counsel, the essence of the claim is that the action or inaction of the attorney deprived the defendant of the ability to choose whether or not to testify in his own behalf. In other words, by not protecting the defendant's right to testify, defense counsel's performance fell below the constitutional minimum, thereby violating the first prong of the *Strickland* test. For example, if defense counsel refused to accept the defendant's decision to testify and would not call him to the stand, counsel would have acted unethically to prevent the defendant from exercising his fundamental constitutional right to

testify. Alternatively, if defense counsel never informed the defendant of the right to testify, and that the ultimate decision belongs to the defendant, counsel would have neglected the vital professional responsibility of ensuring that the defendant's right to testify is protected and that any waiver of that right is knowing and voluntary. Under such circumstances, defense counsel has not acted " 'within the range of competence demanded of attorneys in criminal cases,' " and the defendant clearly has not received reasonably effective assistance of counsel. [Citations omitted.]

In the case at bar, the district court made specific findings after an evidentiary hearing on this issue. "We defer to the district court's findings of fact absent a clearly erroneous determination but apply our own judgment as to whether the conduct determined by these facts constitutes ineffective assistance of counsel." *Wiley v. Wainwright*, 793 F.2d 1190, 1193 (11th Cir. 1986). The district court found that "the evidence fail[ed] to show that the Defendant's will was 'overborne' by his counsel. The Defendant was advised of his right to testify, was advised that he should not exercise that right, and did not protest." Upon review of the record of the evidentiary hearing, we cannot say that these findings of fact are clearly erroneous.

Moreover, although at the time of the evidentiary hearing counsel clearly had misgivings about whether Teague had understood that he was choosing not to testify, a review of ineffective assistance of counsel claims must be made from the perspective of defense counsel, taking into account all circumstances of the case as they were known to counsel *at the time of the representation*. [Citation omitted.] Teague's counsel clearly had advised him that it would be unwise and unnecessary for him to testify. At the evidentiary hearing, counsel testified that when she rested the defense case, she believed that Teague had assented or acceded to her recommendation. We find that counsel's performance was not constitutionally deficient. Because the defendant has failed to meet the first prong of

Strickland, we need not address whether Teague's defense was prejudiced in this case.

U.S. v. Teague, 953 F.2d at 1534-35.

The factual situation at the first trial as presented here by defendant is simply not correct. The record does not disclose that defendant was advised by his trial counsel not to testify because the State was going to offer evidence of his prior escape. Defendant's trial counsel, Keefe, when questioned by defendant's postconviction counsel, Redman, was asked:

> Q. So that I understand correctly, then, one of the reasons strategywise that you had in mind then, for Mr. White not to testify was because if he did, then his prior record would inevitably go before the jury; is that correct?
>
> A. Not his prior record, but the fact that he was a prior convicted felon would have come in to affect his credibility.

According to the presentence investigation report, defendant was sentenced on December 29, 1976, to prison terms of 2 to 5 years on the escape conviction and 15 to 30 months for a burglary conviction. In his testimony, defendant admitted the two prior felony convictions. The two felony convictions quite obviously are the ones about which defendant's trial counsel was concerned.

When asked about the proceedings which occurred immediately before the commencement of the second trial, Keefe testified that "[m]y recollection of this hearing was that the prosecutor had filed a motion to endorse [an] additional witness and informed the court that that witness was going to testify to what could be termed prior similar act[s] evidence. Specifically, I believe it was a prior escape." Keefe went on to testify:

> A. . . . I guess the judge ruled because of time differential, he wasn't going to allow the witness either to be endorsed or to testify about that prior escape as prior similar act evidence.
>
> Q. [Redman] Okay. Do you know whether or not Mr. White understood the import of the judge's ruling at the time?
>
> A. I don't know what Mr. White thought. I know that I

had talked to him earlier about how the fact that he was a prior convicted felon would be admissible as affecting his credibility. So I am comfortable he understood that. I do not specifically recall talking to Mr. White about this issue about this hearing. I don't specifically recall our conversation about that.

Keefe's testimony is summed up in the following:

I do remember obviously when we received a favorable ruling on the motion for new trial, it was based on specifically on [sic] instructions regarding arrest. I remember talking with Mr. White about our success in obtaining a new trial, the reasons for that and the fact that there would be a second trial. I know that we had conversations about how the second trial would proceed and I can't say to you now, I specifically recall "x" day this conversation took place when Mr. White specifically said, "x", "y" and "z". But I am very comfortable with the fact that Mr. White fully was aware we were proceeding with the trial the same, on the same theory. He acquiesced in that and agreed to it.

At the postconviction hearing, defendant testified regarding the first trial that "it was my understanding that if I testified, then Mr. Keefe explained to me that if I were to testify, the prosecuting attorney could come into court and say to the jury, Fred White has done this before; this, being escape." Of course, according to Keefe, no mention of the attempted use of a prior similar act was discussed until the second trial.

Defendant also testified that it was after the second trial had concluded and the defense had rested that he said to Keefe, "Hey, I thought I was going to testify and we discussed it." This was completely contrary to the earlier testimony by Keefe that he had never refused to allow a client to testify who wanted to do so.

After discussing in its order the issue of defendant's contention that he was not allowed to testify, the postconviction trial court stated:

I find that defendant agreed with his experienced counsel that defendant should not testify.

It was proper trial strategy for counsel not to call the

defendant, and the Court so finds.

THE COURT FURTHER FINDS that the defendant has failed to show that his attorney failed to perform at least as well as lawyers with ordinary training and skill in the criminal law in the area. Nor did the defendant show that he was prejudiced in the defense of his case as a result of his attorney's actions or inactions. The defendant's rights under the U.S. and Nebraska Constitutions, were neither denied nor infringed so as to render his convictions void or voidable.

It is quite apparent that the postconviction trial court determined from the record that the facts were as related by trial counsel, Keefe, and not according to the story that defendant came up with for the first time some 10 or more years after the fact. "In an appeal from a denial of a motion for postconviction relief, the lower court's findings will be upheld unless clearly erroneous. *State v. Sanders*, 241 Neb. 687, 490 N.W.2d 211 (1992)." *State v. Victor*, 242 Neb. 306, 309, 494 N.W.2d 565, 568 (1993).

The judgment of the district court is affirmed.

AFFIRMED.

FAHRNBRUCH, J., not participating.

PATRICK B. GIBB, APPELLANT, V. CITICORP MORTGAGE, INC., A FOREIGN CORPORATION, APPELLEE.

518 N.W.2d 910

Filed July 15, 1994. No. S-92-1107.

1. **Pleadings: Appeal and Error.** Whether a petition states a cause of action is a question of law. Regarding such a question, an appellate court has an obligation to reach a conclusion independent of that of the inferior court.
2. **Pleadings: Words and Phrases.** A statement of facts sufficient to constitute a cause of action means a narrative of the events, acts, and things done or omitted which shows a legal liability of the defendant to the plaintiff.

3. **Demurrer: Pleadings.** In determining whether a cause of action has been stated, the petition is to be construed liberally; if as so construed it states a cause of action, a demurrer based on the failure to state a cause of action is to be overruled.
4. _____: _____. In considering a demurrer, a court must assume that the pleaded facts, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of facts not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial.
5. **Demurrer: Pleadings: Appeal and Error.** When reviewing an order sustaining a demurrer, an appellate court accepts the truth of facts well pled and the factual and legal inferences which may reasonably be deduced from such facts, but does not accept conclusions of the pleader.
6. **Fraud.** In order to maintain an action for fraudulent misrepresentation, a plaintiff must allege and prove the following elements: (1) that a representation was made; (2) that the representation was false; (3) that when made, the representation was known to be false or made recklessly without knowledge of its truth and as a positive assertion; (4) that it was made with the intention that the plaintiff should rely upon it; (5) that the plaintiff reasonably did so rely; and (6) that he or she suffered damage as a result.
7. _____. In order to maintain an action based on fraudulent concealment, a plaintiff must allege and prove the following elements: (1) that the defendant concealed or suppressed a material fact; (2) that the defendant had knowledge of this material fact; (3) that this material fact was not within the reasonably diligent attention, observation, and judgment of the plaintiff; (4) that the defendant suppressed or concealed this fact with the intention that the plaintiff be misled as to the true condition of the property; (5) that the plaintiff was reasonably so misled; and (6) that the plaintiff suffered damage as a result.
8. **Fraud: Principal and Agent: Liability.** A principal may be liable for the fraudulent actions of its agent.
9. **Contracts: Fraud.** A disclaimer clause is relevant in determining whether a claimant relied on a false representation disclaimed in the clause.
10. _____: _____. A clause that an article is taken in the condition in which it is, or in other words, "as is," is relevant in determining whether a claimant relied on a false representation concerning the condition of the article, but is not controlling.
11. **Principal and Agent.** Whether an act is within the scope of an agent's apparent authority is to be determined as a question of fact from all the circumstances.
12. **Principal and Agent: Custom and Usage: Presumptions: Estoppel.** Where a principal has, by its voluntary act, placed an agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in presuming that such agent has authority to perform a particular act, and therefore deals with the agent, the principal is estopped from denying the agent's authority as against such third person.
13. **Vendor and Vendee: Fraud.** As between vendor and purchaser, where material facts and information are equally accessible to both, and nothing is said or done

which tends to impose on the purchaser or to mislead him or her, the failure of the vendor to disclose such facts does not amount to actionable fraud.

14. **Fraud.** One is justified in relying upon a representation in all cases if it is a positive statement of fact and if an investigation would be required to discover the truth.
15. **Fraud: Liability.** An actor who, in the course of the actor's business, profession, or employment (or in any other transaction in which the actor has a pecuniary interest), supplies false information for the guidance of others in their business transactions is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if the actor fails to exercise reasonable care or competence in obtaining or communicating the information. The liability is limited to loss suffered (1) by the person or one of a limited group of persons for whose benefit and guidance the actor intends to supply the information or knows that the recipient intends to supply it; and (2) through reliance upon the information in a transaction that the actor intends the information to influence or knows that the recipient so intends, or in a substantially similar transaction. However, the liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created in any of the transactions in which it is intended to protect them.
16. **Principal and Agent: Liability.** The rule that a principal is liable for the contracts of its agent applies even though the agent, in contracting, acts in his or her own interests and adversely to the principal, where the party with whom the agent contracts has no knowledge of the agent's dereliction and is not cognizant of any fact charging him or her with knowledge thereof.
17. **Breach of Contract: Pleadings: Proof.** In order to recover for breach of contract, a plaintiff must plead and prove the existence of a promise, its breach, damage, and compliance with any conditions precedent that actuate the defendant's duty.
18. **Contracts: Fraud: Election of Remedies.** A party who has been induced to enter into a contract by fraud has, upon its discovery, an election of remedies; he or she may either affirm the contract and sue for damages or disaffirm it and be reinstated to the position he or she was in before the contract was consummated.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Reversed and remanded for further proceedings.

Steven J. Olson and Brian J. Siebken, of Liakos & Olson, for appellant.

Bartholomew L. McLeay and Michael K. Bydalek, of Kutak Rock, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ.

CAPORALE, J.

I. STATEMENT OF CASE

Through his operative petition, the plaintiff-appellant, Patrick B. Gibb, seeks, under a variety of theories, to recover damages resulting from the termite infestation of the house he purchased through an agent acting for the seller, the defendant-appellee, Citicorp Mortgage, Inc. After Citicorp successfully demurred, Gibb elected to stand on his pleading; the district court thereupon dismissed his action. Gibb then appealed to the Nebraska Court of Appeals, assigning the dismissal as error, claiming in effect that the district court erred in concluding he had failed to state a cause of action. We, on our own motion, removed the matter to this court in order to regulate the caseloads of the two appellate tribunals. We now reverse, and remand for further proceedings.

II. SCOPE OF REVIEW

Whether a petition states a cause of action is obviously a question of law. Regarding such a question, an appellate court has an obligation to reach a conclusion independent of that of the inferior court. *Bartunek v. Gentrup, ante* p. 18, 516 N.W.2d 253 (1994).

A statement of facts sufficient to constitute a cause of action means a narrative of the events, acts, and things done or omitted which shows a legal liability of the defendant to the plaintiff. *Horton v. Ford Life Ins. Co., ante* p. 171, 578 N.W.2d 88 (1994); *Hoiengs v. County of Adams*, 245 Neb. 877, 516 N.W.2d 223 (1994).

In determining whether a cause of action has been stated, the petition is to be construed liberally; if as so construed it states a cause of action, a demurrer based on the failure to state a cause of action is to be overruled. *Id.*; *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.*, 244 Neb. 408, 507 N.W.2d 275 (1993). A court must assume that the pleaded facts, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of facts not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial. *Hitzemann v. Adam, ante* p. 201,

518 N.W.2d 102 (1994); *Hoiengs, supra.*

When reviewing an order sustaining a demurrer, an appellate court accepts the truth of facts well pled and the factual and legal inferences which may reasonably be deduced from such facts, but does not accept conclusions of the pleader. *Horton, supra*; *Durand v. Western Surety Co.*, 245 Neb. 649, 514 N.W.2d 840 (1994).

III. FACTUAL ALLEGATIONS

According to the operative petition, Citicorp acquired the house through the foreclosure of a mortgage when the mortgagee abandoned the property because of extensive termite infestation and damage and defaulted on his mortgage obligation. Citicorp's selling agent had been informed through a report of a termite service that the property in question was infested with termites and appeared to have extensive damage. The service recommended that a qualified building inspector assess the damage. However, Citicorp chose to ignore the recommendation and instead hired the service to treat the termites and "[shore] up" the visible damage to the house.

Prior to the purchase, Citicorp's selling agent showed Gibb a single area where termite damage had occurred and assured Gibb that this was the only termite-damaged area and that all necessary repairs and treatments had been made to eliminate the termite problem.

Although neither the agent nor Citicorp made any effort to determine the full extent of the damage, the agent knew that the nonvisible termite damage had not been repaired and that it was much greater than the visible evidence indicated; nonetheless, the agent represented that the damage had been repaired and the termite problem alleviated. Citicorp knew the agent's representations to be false but failed to repudiate them; rather, Citicorp and the agent concealed and suppressed all evidence of termite damage, failed to disclose that the termite damage extended beyond those areas said to be repaired, and concealed and suppressed the fact that the additional " 'wood destroying insect inspection' " required by the purchase agreement to be made at Gibb's cost had not in fact been obtained. In point of fact, at the closing of the transaction, Citicorp provided Gibb

with a copy of a 5-month-old report prepared by the termite service after it had submitted its recommendation that the damage be assessed, which indicated that visible evidence of infestation was noted and proper control measures were performed.

The purchase agreement recited that the transaction was "based upon [Gibb's] personal inspection or investigation of the Property and not upon any representation or warranties of condition by [Citicorp] or [its] agent." The agreement further provided that the property was "sold strictly in 'AS IS' condition. [Citicorp] does not make any warranties regarding the condition of the property at the time of sale and thereafter."

Nonetheless, Gibb claims to have relied on the misrepresentations made to him and asserts he has suffered damage as a consequence.

IV. ANALYSIS

Gibb seeks recovery under any one of two fraud theories, a negligence theory, or a contract theory.

1. Fraud Theories

Gibb first avers he was deceived by the fraudulent misrepresentations and fraudulent concealment made by Citicorp through its agent.

(a) Fraudulent Misrepresentation

In order to maintain an action for fraudulent misrepresentation, the plaintiff must allege and prove the following elements: (1) that a representation was made; (2) that the representation was false; (3) that when made, the representation was known to be false or made recklessly without knowledge of its truth and as a positive assertion; (4) that it was made with the intention that the plaintiff should rely upon it; (5) that the plaintiff reasonably did so rely; and (6) that he or she suffered damage as a result. *Nielsen v. Adams*, 223 Neb. 262, 388 N.W.2d 840 (1986).

Gibb has pled all the essential elements for recovery based on fraudulent misrepresentation. He has claimed that Citicorp's selling agent represented that the only termite damage was the visible damage and further represented that all the necessary

repairs and treatments had been made. Therefore, a representation was alleged. In addition, Gibb avers that the representation was false because the report from the termite service reveals extensive damage and recommends that a qualified building inspector assess the damage.

Moreover, it can reasonably be inferred that the representation was made with the intention that Gibb rely on it because it relates to a material fact, and Gibb asserts he did in fact rely on the misrepresentations and that he suffered damage as a consequence.

(b) Fraudulent Concealment

In order to maintain an action based on fraudulent concealment, the plaintiff must allege and prove the following elements: (1) that the defendant concealed or suppressed a material fact; (2) that the defendant had knowledge of this material fact; (3) that this material fact was not within the reasonably diligent attention, observation, and judgment of the plaintiff; (4) that the defendant suppressed or concealed this fact with the intention that the plaintiff be misled as to the true condition of the property; (5) that the plaintiff was reasonably so misled; and (6) that the plaintiff suffered damage as a result. *Nelson v. Cheney*, 224 Neb. 756, 401 N.W.2d 472 (1987).

Gibb's operative petition states sufficient facts to allege all the elements for recovery based on fraudulent concealment. He avers that Citicorp concealed or suppressed the fact that the termite damage was more extensive than the visible damage. In addition, by asserting that Citicorp's agent informed it of the termite service's initial report and recommendations, Gibb claims that Citicorp knew the extent of the damage.

Furthermore, Gibb alleges that the material facts regarding the termite damage were not within his diligent attention or observation because he was misled as to the true condition of the house.

Gibb also charges that Citicorp concealed the extent of the termite damage to intentionally mislead him as to the true condition of the house. In addition, the petition states that Gibb was misled and suffered damage as a result.

(c) Citicorp's Contentions

Notwithstanding that Gibb has pled all of the elements of those two bases of recovery, Citicorp asserts that where an agreement for the sale of real estate contains a disclaimer and an "as is" clause such as those present here, the seller should not be held liable for the fraudulent misrepresentations or concealments of its agent. Citicorp further urges that Gibb had as much access to the relevant information as did Citicorp.

(i) Effect of "As Is" and Disclaimer Clauses

In so arguing, Citicorp acknowledges that under our law, a principal may be liable for the fraudulent actions of its agent, *Corman v. Musselman*, 232 Neb. 159, 439 N.W.2d 781 (1989), but urges that we adopt the position of New York's highest court in *Danann Realty Corp. v. Harris*, 5 N.Y.2d 317, 157 N.E.2d 597, 184 N.Y.S.2d 599 (1959). Therein, the New York Court of Appeals held that a purchaser had no cause of action against a seller for false representation when the contract for the purchase of a lease contained disclaimer, "as is," and merger clauses as follows:

> "The Purchaser has examined the premises agreed to be sold and is familiar with the physical condition thereof. The Seller has not made and does not make any representations as to the physical condition, rents, leases, *expenses, operation* or any other matter or thing affecting or related to the aforesaid premises, except as herein specifically set forth, and the Purchaser hereby *expressly acknowledges that no such representations have been made, and the Purchaser further acknowledges that it has inspected the premises and agrees to take the premises 'as is'* * * * It is understood and agreed that all understandings and agreements heretofore had between the parties hereto are merged in this contract, which alone fully and completely expresses their agreement, *and that the same is entered into after full investigation, neither party relying upon any statement or representation*, not embodied in this contract . . . ."

(Emphasis in original.) *Danann Realty Corp.*, 5 N.Y.2d at 320, 157 N.E.2d at 598, 184 N.Y.S.2d at 601.

The *Danann Realty Corp.* purchaser nonetheless claimed

that he had been induced to enter into a contract for the purchase of a lease by the sellers' false oral representations regarding the building's operating expenses. The purchaser sought to affirm the contract and recover damages for fraud.

The *Danann Realty Corp.* majority concluded that the specific disclaimer clause, in conjunction with the merger clause, declared that the parties did not rely on representations not embodied in the contract and thus prevented the purchaser from adducing parol evidence to establish otherwise, thereby destroying the purchaser's allegations of reliance.

However, on several occasions we have addressed whether a disclaimer clause within a contract will bar a purchaser's fraud-based claim. In *Schuster v. North American Hotel Co.*, 106 Neb. 672, 184 N.W. 136 (1921), *reh'g denied* 106 Neb. 679, 684, 186 N.W. 87, 89, we wrote:

> It is quite generally held that a provision in a contract, to the effect that the agent cannot bind the company by any representations, statements or agreements, will not relieve the principal from responsibility for the fraudulent representations, as to the subject-matter of the contract, made by the agent, since such representations are within the scope of the agent's actual or ostensible authority.

Although *Schuster* concerned the sale of stock, we applied the same principle to the sale of real estate. In *Menking v. Larson*, 112 Neb. 479, 199 N.W. 823 (1924), we held that a disclaimer clause in a contract for the purchase of real estate does not relieve the vendor or his agent from responsibility for the fraudulent representations made by the vendor's agent concerning the subject matter of the contract.

In *Menking*, the disclaimer clause was similar to the provision in the agreement now before us. There, the purchaser stated and agreed that " 'he has made personal inspection of the property covered by the within contract, and is buying it solely on his own investigations, and not on any representations made by any one else as to any material matter affecting said property, or his purchase thereof.' " *Id.* at 484, 199 N.W. at 825.

Considering whether such a provision barred the purchaser from maintaining any action for fraud or deceit, we reiterated:

"A provision in such a contract, to the effect that the agent

> cannot bind the company by any representations, statements or agreements, will not relieve the principal from responsibility for the fraudulent representations, made by its agents, concerning the subject-matter of the contract . . . for a sales agent has ostensible authority to make representations as to the subject-matter of the sale, and his fraud, committed within the limits of such authority, will fix responsibility upon his principal."

Id.

More recently, in *Flakus v. Schug*, 213 Neb. 491, 494-95, 329 N.W.2d 859, 863 (1983), *overruled on other grounds, Nielsen v. Adams*, 223 Neb. 262, 388 N.W.2d 840 (1986), we emphasized:

> It is true that in discussing the elements of fraud we said a disclaimer clause is relevant in determining whether a claimant relied on a false representation disclaimed in the clause. We also said, however, that the disclaimer is ineffective to preclude the trier of fact from considering whether fraud induced formation of the bargain.

We have also concluded that an "as is" clause does not necessarily bar a purchaser's fraud-based claim, writing in *Wolford v. Freeman*, 150 Neb. 537, 547, 35 N.W.2d 98, 103 (1948), that " '[a] provision that the buyer takes the article in the condition in which it is, or in other words, "as is," does not prevent fraudulent representations relied on by the buyer from constituting fraud . . . .' "

Claiming fraud, the *Wolford* plaintiff sought to rescind a contract for the purchase of a house, which recited that he had " 'been advised as to settling of structure and is buying same as is.' " 150 Neb. at 546, 35 N.W.2d at 101. He asserted that the vendor's agent represented that the cracks in the foundation of the house had been repaired and that the damage had been corrected, so that the purchaser should have no fear of further cracking.

After the purchaser took possession, the cracks in the foundation became progressively worse and eventually appeared in the outer walls and the foundation. The purchaser learned that the house had been built on filled ground, in violation of the city building code, and asserted the vendor knew the house had been built on filled ground, rendering the

foundation faulty, yet had concealed those facts.

We determined that the purchaser was entitled to prevail unless the vendor was relieved by the "as is" clause. We then reasoned that while the clause disclosed the purchaser's knowledge of the cracking, it did not disclose or suggest the cause of that condition. We accordingly ruled that the clause did not bind the purchaser to buying a house with the undisclosed or concealed condition which caused the visible cracking. Thus, a clause that an article is taken in the condition in which it is, or in other words, "as is," is relevant in determining whether a claimant relied on a false representation concerning the condition of the article, but is not controlling.

In like fashion here, Gibb agreed to purchase a house with visible termite damage, which Citicorp's agent misrepresented as being the extent of the termite destruction. Like the purchaser in *Wolford*, Gibb was aware of the repair to the visible damage to the structure, but, according to his allegations, was unaware of the extent of the damage. Thus, just as the disclaimer does not necessarily prevent Gibb from stating causes of action for fraudulent misrepresentation or fraudulent concealment, neither does the "as is" clause, nor do the two clauses together prevent him from doing so. Under these circumstances, the question as to whether Gibb acted reasonably is one of fact.

(ii) Principal's Responsibility for Agent

Quoting a portion of another aspect of *Wolford*, Citicorp also contends, in effect, that as the house was sold with a disclaimer and an "as is" clause, Gibb necessarily knew that Citicorp's agent had no authority to make any representations.

In this connection Citicorp calls our attention to the following language in *Wolford*:

> " 'A principal who authorizes an agent to conduct a transaction for him, intending that the agent shall make representations to another in the course of it which the principal knows to be untrue, is liable for such misrepresentations . . . if, although he does not intend that the agent shall make misrepresentations, he should know that the agent will do so, the principal is liable . . . .' "

[Citation omitted.]

. . . .

"As between vendor and purchaser, where material facts and information are equally accessible to both, and nothing is said or done which tends to impose on the purchaser or to mislead him, the failure of the vendor to disclose such facts does not amount to actionable fraud . . . ."

150 Neb. at 544-45, 35 N.W.2d at 102-03. However, Citicorp neglects to quote the remainder of that paragraph, which comments on when an agent's misrepresentations constitute actionable fraud:

"[W]here such facts are known by the vendor and he knows them to be not within reach of the reasonably diligent attention, observation and judgment of the purchaser, and they are such as would readily mislead the purchaser as to the true conditions of the property, the vendor is bound to disclose such facts."

150 Neb. at 545, 35 N.W.2d at 103. According to the operative petition, Citicorp and its agent knew of the extensive termite infestation and damage but elected to repair only the visible portion, and its agent represented that all the necessary repairs had been made and the problem had been eliminated. Under *Wolford*'s analysis, Citicorp had a duty to disclose such facts relating to the condition of the property regardless of whether it authorized its agent to make representations concerning the condition of the property.

Moreover, we have declared:

An agent, even though the contract which he presents contains a clause declaring that the company will not be bound by the representations that he may make, is known to be an agent sent out for the express purpose of making representations as an inducement to the sale . . . and the provision in the contract, therefore, is not considered as limiting the scope of his ostensible authority [and] the company is responsible . . . .

Schuster v. North American Hotel Co., 106 Neb. 672, 184 N.W. 136 (1921), *reh'g denied*, 106 Neb. 679, 684, 186 N.W. 87, 89.

Whether an act is within the scope of an agent's apparent

authority is to be determined as a question of fact from all the circumstances. *Draemel v. Rufenacht, Bromagen & Hertz, Inc.*, 223 Neb. 645, 392 N.W.2d 759 (1986); *Moore v. Puget Sound Plywood*, 214 Neb. 14, 332 N.W.2d 212 (1983).

Consequently, Citicorp cannot escape liability for the fraudulent conduct of its agent on the sole basis that it included a disclaimer clause in the purchase agreement. What was said and whether the statements were within the agent's apparent authority are questions of fact.

(iii) Access to Information

Citing *Nelson v. Cheney*, 224 Neb. 756, 401 N.W.2d 472 (1987), Citicorp argues as well that as it had no contact with the termite service, it had no greater knowledge than Gibb concerning the termite damage, and thus, Citicorp cannot have any misrepresentation liability to Gibb. Once again, Citicorp's argument overlooks the posture of the case and the allegations of the operative petition.

Moreover, Citicorp's reading of *Nelson* is incorrect. The *Nelson* purchaser demanded that the vendors' agent obtain a termite inspection prior to closing. The agent explained that an exterminator already had conducted an inspection and that the agent had the termite-proofing guarantee. The sale closed, and the agent delivered the guarantee to the purchaser. The purchaser then discovered termite damage and brought an action against the vendors under the theories of false representation and fraudulent concealment. In upholding the dismissal of the false representation claim, we noted that the only representations alleged to have been made by the vendors regarding termites related to the existence of the termite-proofing guarantee. The guarantee only obligated the exterminator to return to the premises if reinfestation occurred within the guarantee period and to treat the premises for a fee. The purchaser failed to allege that the vendors or their agents made any representations concerning the condition of the premises, an essential element of the cause.

That is not the situation here; Gibb alleged specific misrepresentations regarding the extent of the termite damage and its repair. Citicorp may be liable for its agent's

misrepresentations if the fact proves to be that Gibb was justified in presuming that Citicorp's agent had the authority to make representations concerning the condition of the house.

> " ' "Where a principal has, by his voluntary act, placed an agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in presuming that such agent has authority to perform a particular act, and therefore deals with the agent, the principal is estopped as against such third person from denying the agent's authority. . . ." ' "

Draemel, 223 Neb. at 653, 392 N.W.2d at 764.

As to Gibb's fraudulent concealment claim, Citicorp further argues that nothing that it did or said regarding the property could be considered misleading, since the petition reveals that the termite service was an independent entity unassociated with Citicorp. Citicorp seems to argue that Gibb could have acquired the information regarding the extent and repair of the termite damage from the service if only he had asked. Citicorp urges that the material fact suppressed must not have been equally within the knowledge or reach of the purchaser for a purchaser to proceed with a fraudulent concealment claim. See *Nelson, supra*.

However, this argument ignores part of Gibb's claim. He alleges that Citicorp's agent misrepresented the condition of the premises. Gibb may argue that the information was not equally accessible to him due to the misrepresentations of Citicorp's agent, for we have written that " '[a]s between vendor and purchaser, where material facts and information are equally accessible to both, and nothing is said or done which tends to impose on the purchaser or to mislead him, the failure of the vendor to disclose such facts does not amount to actionable fraud . . . .' " *Nelson*, 224 Neb. at 760, 401 N.W.2d at 475. Accord, *Christopher v. Evans*, 219 Neb. 51, 361 N.W.2d 193 (1985); *Flakus v. Schug*, 213 Neb. 491, 329 N.W.2d 859 (1983), *overruled on other grounds, Nielsen v. Adams*, 223 Neb. 262, 388 N.W.2d 840 (1986); *Dargue v. Chaput*, 166 Neb. 69, 88 N.W.2d 148 (1958); *Wolford v. Freeman*, 150 Neb. 537, 35 N.W.2d 98 (1948). In the instant case, Citicorp's agent is alleged

to have made representations that misled Gibb. Therefore, Citicorp may have had a duty to disclose facts regarding the condition of the premises to correct its agent's misrepresentations.

Moreover, the general rule is that one is justified in relying upon a representation in all cases if it is a positive statement of fact and if an investigation would be required to discover the truth. *Omaha Nat. Bank v. Manufacturers Life Ins. Co.*, 213 Neb. 873, 332 N.W.2d 196 (1983). While no action will lie where ordinary prudence would have prevented the deception, this rule is generally applied when the means of discovering the truth was in the hands of the party defrauded. *Id.* In the instant case, Gibb claims to have relied on the information provided by Citicorp's agent. Whether such reliance was reasonable when the purchase agreement contained a disclaimer is a question of fact.

Citicorp's contentions with respect to Gibb's fraud theories are without merit.

2. Negligence Theory

Gibb next asserts that Citicorp negligently misrepresented the situation, declaring that Citicorp, through its agent, failed to use reasonable care when he represented that the property was free of termites. Furthermore, Gibb charges that the representations by Citicorp's agent were false, that he relied upon the representations, and that as a result he suffered damage. And it can be inferred from the setting in which the transaction allegedly arose that both the agent and Citicorp had a pecuniary interest in it.

Without detailing the elements of the negligent misrepresentation cause, we, in *Flamme v. Wolf Ins. Agency*, 239 Neb. 465, 476 N.W.2d 802 (1991), citing *Bayer v. Lutheran Mut. Life Ins. Co.*, 184 Neb. 826, 172 N.W.2d 400 (1969), ruled that an insurance agent or broker may be held liable for a negligent misrepresentation made to an insured. *Bayer* held that a letter in which the insurer's agent misrepresented the amount of accumulated benefits bound the insurer. Subsequently, in the course of holding that an accountant may become liable to a third party for a negligently performed service to the

accountant's client, we, in *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.*, 244 Neb. 408, 507 N.W.2d 275 (1993), noted the position of Restatement (Second) of Torts § 552 (1977) regarding negligent misrepresentation as a basis of liability.

Thereunder, liability for negligent misrepresentation is based upon the failure of the actor to exercise reasonable care or competence in supplying correct information. *Id.*, § 552, comment *a*. Section 552 specifies at 126-27:

> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
>
> (2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered
>
> (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
>
> (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.
>
> (3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.

The Restatement further observes that the liability for negligent misrepresentation is more restricted than for fraudulent misrepresentation, explaining that the reason for the narrower scope of liability fixed for negligent misrepresentation is the difference between the obligations of honesty and of care.

> Honesty requires only that the maker of a representation speak in good faith and without consciousness of a lack of any basis for belief in the truth or accuracy of what he

> says. . . . Any user of commercial information may reasonably expect the observance of this standard by a supplier of information to whom his use is reasonably foreseeable.
>
> On the other hand, it does not follow that every user of commercial information may hold every maker to a duty of care. Unlike the duty of honesty, the duty of care to be observed in supplying information for use in commercial transactions implies an undertaking to observe a relative standard, which may be defined only in terms of the use to which the information will be put, weighed against the magnitude and probability of loss that might attend that use if the information proves to be incorrect.

§ 552, comment *a.* at 128. Therefore, the difference between fraudulent misrepresentation and negligent misrepresentation is the duty required in each claim. In fraudulent misrepresentation, one becomes liable for breaching the general duty of good faith or honesty. However, in a claim of negligent misrepresentation, one may become liable even though acting honestly and in good faith if one fails to exercise the level of care required under the circumstances.

As noted in *St. Paul Fire & Marine Ins. Co.*, 244 Neb. at 415, 507 N.W.2d at 280, "even in the absence of fraud, there exist circumstances under which an accountant who negligently performs a service for the accountant's client may become liable to a third party."

While we have not heretofore specifically enumerated the elements of negligent misrepresentation, other jurisdictions have adopted the language of § 552 of the Restatement. See, *St. Joseph's H & M. Ctr. v. Reserve Life*, 154 Ariz. 303, 742 P.2d 804 (Ariz. App. 1986); *Pietramale v. Dugay*, 714 S.W.2d 281 (Tenn. 1986); *Brown v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 197 Mont. 1, 640 P.2d 453 (1982); *Beeck v. Kapalis*, 302 N.W.2d 90 (Iowa 1981); *Ryan v. Kanne*, 170 N.W.2d 395 (Iowa 1969); *Springdale Gardens v. Countryland Dev., Inc.*, 638 S.W.2d 813 (Mo. App. 1982); *Merriman v. Smith*, 599 S.W.2d 548 (Tenn. App. 1979); *First State Sav. v. Albright & Assoc.*, 561 So. 2d 1326 (Fla. App. 1990), *disapproved on other grounds, Garden v. Frier*, 602 So. 2d 1273 (Fla. 1992);

Price-Orem Inv. v. Rollins, Brown & Gunnell, 713 P.2d 55 (Utah 1986).

We follow suit and now specifically adopt the definition of the negligent misrepresentation cause of action found in § 552, *supra*.

As we have established in part IV(1)(c)(ii) that a principal may be liable for the representations of its agent, it follows that Gibb's negligence theory does not fail merely because he alleges that Citicorp's liability arises from its agent's negligent misrepresentations.

The rule that a principal is liable for the contracts of its agent applies even though the agent, in contracting, acts in his or her own interests and adversely to the principal, where the party with whom the agent contracts has no knowledge of the agent's dereliction and is not cognizant of any fact charging him or her with knowledge thereof. The principal, having selected its representative and vested him or her with apparent authority, should be the loser in such case, and not the innocent party who relied thereon. *Draemel v. Rufenacht, Bromagen & Hertz, Inc.*, 223 Neb. 645, 392 N.W.2d 759 (1986).

Other jurisdictions have recognized a purchaser's claim against a vendor based on the negligent misrepresentations of the vendor's agent. See, *John v. Robbins*, 764 F. Supp. 379 (M.D.N.C. 1991); *Silva v. Stevens*, 156 Vt. 94, 589 A.2d 852 (1991). In *John*, the purchasers brought an action against the vendors and their real estate broker, alleging that the vendors were directly liable for fraud and negligent misrepresentation, and vicariously liable for the fraudulent and negligent misrepresentation of their broker. On appeal, the reviewing court, noting that North Carolina had adopted the Restatement (Second) of Torts definition of negligent misrepresentation, determined that a material question of fact regarding the reasonableness of the purchasers' reliance precluded a grant of summary judgment in favor of the vendors on the purchasers' negligent misrepresentation claim.

In so ruling, the *John* court acknowledged that a purchaser could bring a claim against a vendor based on the negligent misrepresentations of its agent under the § 552 definition.

Silva also held that the vendor of a house is responsible for

the negligent misrepresentations made by an agent within the scope of the agent's authority.

Thus, as was the case with respect to Gibb's fraud theories, the reasonableness of Gibb's reliance on the agent's misrepresentations under these circumstances is a factual question.

3. Contract Theory

Lastly, Gibb asserts Citicorp breached the contract between the parties.

In order to recover for breach of contract, the plaintiff must plead and prove the existence of a promise, its breach, damage, and compliance with any conditions precedent that actuate the defendant's duty. *Department of Banking, Receiver v. Wilken*, 217 Neb. 796, 352 N.W.2d 145 (1984). Gibb alleged that pursuant to the purchase agreement, Citicorp was required to obtain a wood-destroying-insect inspection at his expense, that Citicorp failed to arrange the inspection but presented Gibb with an old inspection report, and that he was damaged.

Citicorp argues not that Gibb has failed to plead the necessary elements of a breach of contract, but that such a claim is inconsistent with his other theories of recovery. In support of its argument, Citicorp cites *Schuster v. North American Hotel Co.*, 106 Neb. 672, 184 N.W. 136 (1921), *reh'g denied* 106 Neb. 679, 682, 186 N.W. 87, 88:

> When fraudulent promises act as the inducement to the execution of a written contract, the remedy is for fraud, and not upon the oral promise as a contractual obligation, for the oral promise as an obligation has become merged in the written agreement and cannot, as such, legally be proved.

However, in the instant case, Gibb is not asking for the enforcement of any fraudulent promise. Regardless of any misrepresentations or concealments, Gibb charges that Citicorp failed to perform a term of the purchase agreement and claims damages as the result of that breach. We have ruled that a party who has been induced to enter into a contract by fraud has, upon its discovery, an election of remedies. He or she may either affirm the contract and sue for damages or

disaffirm it and be reinstated to the position he or she was in before the contract was consummated. *Russo v. Williams*, 160 Neb. 564, 71 N.W.2d 131 (1955).

Here, Gibb asserts four separate theories of recovery that are all based on the same cause of action, that is to say, on the same set of facts on which recovery may be had. See *Lewis v. Poduska*, 240 Neb. 312, 481 N.W.2d 898 (1992). For his fraud- and negligence-based theories, Gibb elected to affirm the contract and sue for damages instead of requesting rescission. Thus, Gibb does not, on the one hand, ask the court to disaffirm the contract in his fraud- and negligence-based claims and, on the other, ask the court to recognize the contract in his breach of contract claim. Since Gibb chose to affirm the contract, it is entirely consistent for him to also assert a claim based on breach of its terms. Therefore, all of Gibb's legal theories of recovery are consistent with each other.

V. JUDGMENT

For the foregoing reasons, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

NANCY STEINEKE, APPELLANT, V. SHARE HEALTH PLAN OF NEBRASKA, INC., APPELLEE.

518 N.W.2d 904

Filed July 15, 1994. No. S-92-1115.

1. **Summary Judgment: Appeal and Error.** In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
2. **Summary Judgment.** Summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.

3. **Expert Witnesses: Physicians and Surgeons.** Medical opinions must be based on reasonable medical certainty.
4. _____: _____. Medical testimony couched in terms of "possibility" is insufficient to support a causal relationship.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Affirmed.

James R. Welsh, of Bradford, Coenen, Ashford & Welsh, for appellant.

Leo A. Knowles and Ronald G. Fleming, of McGrath, North, Mullin & Kratz, P.C., for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ.

FAHRNBRUCH, J.

Nancy Steineke appeals the order of the district court for Douglas County granting summary judgment in favor of Share Health Plan of Nebraska, Inc. (Share), in her breach of contract action against Share.

We affirm the order of the district court.

STANDARD OF REVIEW

In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Larsen v. First Bank*, 245 Neb. 950, 515 N.W.2d 804 (1994).

Summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Id.*

FACTS

Giving Steineke the benefit of all reasonable inferences deducible from the evidence, as we are required to do, the facts of this case are as follows:

Share, at all times material to this case, was a Nebraska corporation authorized to operate a health maintenance

organization pursuant to Neb. Rev. Stat. § 44-3201 et seq. (Reissue 1988) (§ 44-3201 et seq. has since been replaced by the Health Maintenance Organization Act, Neb. Rev. Stat. § 44-3292 et seq. (Cum. Supp. 1992)). Steineke, an employee of Douglas County, was entitled to health care services provided by Share as a result of an agreement between Share and Douglas County.

The evening of September 30, 1987, Steineke entered the emergency room at Archbishop Bergan Mercy Hospital (Bergan) complaining of left lower abdominal pain. Steineke was seen the following day, October 1, by Dr. Robert Luby, who informed her that she had an ectopic pregnancy. An ectopic pregnancy is one in which a fertilized ovum develops outside the uterine cavity. Dorland's Illustrated Medical Dictionary 1349 (27th ed. 1988). It was ultimately determined that Steineke's fetus had implanted in her left fallopian tube.

Dr. Luby, who was a non-Share physician at that time, advised Steineke that emergency surgery was required. Dr. Luby scheduled the surgery to be done at Bergan that same day by a Share physician. In the surgery contemplated by Dr. Luby, the physician would remove the fetus and tissue from Steineke's fallopian tube in an attempt to preserve the tube so that a microsurgical technique could be used at a later time to repair the tube. Steineke's other fallopian tube had been removed in 1983 due to a prior tubal pregnancy.

Before Steineke was taken to surgery, a representative of Share telephoned Steineke at Bergan and informed Steineke that it was necessary for her to be transferred to University of Nebraska Medical Center (UNMC), where her primary physician was located. Steineke was told that if she chose to remain at Bergan, she would be responsible for the cost of her care.

Steineke was then transferred to UNMC by ambulance. At UNMC, Steineke was informed that the physicians at that facility would be unable to save either the fetus or her fallopian tube because "that procedure" was not done at UNMC. The record fails to reflect any evidence that Dr. Luby, Steineke, or any Share representative was aware at the time Steineke was transferred to UNMC that physicians at UNMC would be

unable to perform a procedure to attempt to save Steineke's fallopian tube such as the procedure contemplated by the physicians at Bergan. Before signing a written consent for surgery at UNMC, Steineke was told that neither her fetus nor her remaining fallopian tube could be saved. Surgery was performed, rendering Steineke permanently unable to conceive and bear children.

On April 3, 1990, Steineke sued Share, alleging in her petition that Share breached its contract to provide medical services to Steineke by "refusing to authorize the medical services of Bergen [sic] to be covered for the emergency medical problems of [Steineke], when the defendant Share, knew or should have known, that such services to be rendered to the plaintiff, as an emergency were covered by the [health care plan] with Share." Steineke requested damages for mental and physical pain and suffering, both past and future, as well as damages "by reason of her inability to conceive and bear children in the future."

The trial court subsequently sustained a motion by Share for summary judgment

> for the reason that no genuine issue of fact exists with respect to the issue of causation, and there is no genuine issue of fact that any act or omission of the Defendant had any causal relation to the damages claimed by the Plaintiff, which damages, to the extent that they seek recompense for pain and suffering and/or emotional distress, are not recoverable in a breach of contract claim as a matter of law.

Steineke timely appealed from that order. We removed the case from the Nebraska Court of Appeals pursuant to our authority to regulate the workload of the appellate courts of this state.

ASSIGNMENT OF ERROR

Steineke's sole assignment of error on appeal is that the trial court erred in granting summary judgment for Share.

ANALYSIS

Steineke argues that because of Share's actions in overriding the judgment of her physician, Dr. Luby, she lost the chance to

keep her one remaining fallopian tube intact and thus lost the chance to conceive and bear children through the breach of some contractual duty on the part of Share.

Share argues that any alleged breach of contract on its part was not the proximate cause of Steineke's damages, because there is a lack of evidence that Steineke's remaining fallopian tube could have been saved had her surgery been done at Bergan. Share also argues that subsequent intervening acts by the physicians at UNMC were the cause of Steineke's damages.

As to Steineke's loss of chance arguments, she has cited no authority, nor have we discovered any, that Nebraska recognizes loss of chance as a cause of action or as an element of damages in either tort or contract cases. We decline to adopt the loss of chance doctrine in this case, and therefore we do not address Steineke's loss of chance arguments.

Because the loss of chance theory is inapplicable to our analysis of this case, we are instead guided by principles of contract law as to Share's argument that any alleged breach of contract on its part was not the proximate cause of Steineke's alleged damages.

> It is a basic concept that in any damage action for breach of contract the claimant must prove that the breach of contract complained of was the proximate cause of the alleged damages. In a breach of contract case there must be a causal relationship between the damages asserted and the breach relied upon. Proof which leaves this issue in the realm of speculation and conjecture is insufficient to support a judgment.

Omaha P. P. Dist. v. Darin & Armstrong, Inc., 205 Neb. 484, 497, 288 N.W.2d 467, 474 (1980).

As to whether Share's alleged breach of contract was the proximate cause of Steineke's alleged damages, the rule is that the party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must furnish sufficient evidence to demonstrate that such movant is entitled to judgment as a matter of law if the evidence presented for summary judgment remains uncontroverted. *Dalton Buick v. Universal Underwriters Ins. Co.*, 245 Neb. 282, 512 N.W.2d 633 (1994). After the movant has shown facts entitling it to

judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which, as a matter of law, prevents judgment for the movant. *Id.*

Share's evidence on the issue of proximate cause of Steineke's alleged damages was composed entirely of the deposition testimony of Dr. Luby entered into evidence by Share in support of its motion for summary judgment. Steineke joined in offering Dr. Luby's deposition, and offered no other expert evidence in opposition to Share's summary judgment motion.

Dr. Luby, Steineke's medical expert witness, testified in his deposition that in his opinion, there would have been a better chance of saving Steineke's fallopian tube had she remained at Bergan. However, Dr. Luby was unable to say with a reasonable degree of medical certainty whether Steineke's tube could have been saved.

Medical opinions must be based on reasonable medical certainty. *Caradori v. Frontier Airlines*, 213 Neb. 513, 329 N.W.2d 865 (1983). Accord, *Edmonds v. IBP, inc.*, 239 Neb. 899, 479 N.W.2d 754 (1992); *In re Interest of D.L.S.*, 230 Neb. 435, 432 N.W.2d 31 (1988).

The only permissible inference from the evidence is that Steineke's fallopian tube *possibly* could have been saved had she remained at Bergan for surgery. Medical testimony couched in terms of "possibility" is insufficient to support a causal relationship. See, e.g., *Hohnstein v. W.C. Frank*, 237 Neb. 974, 468 N.W.2d 597 (1991); *Lane v. State Farm Mut. Automobile Ins. Co.*, 209 Neb. 396, 308 N.W.2d 503 (1981). See, also, *Fuglsang v. Blue Cross*, 235 Neb. 552, 456 N.W.2d 281 (1990) (holding that a medical opinion which is rendered on a 50-50 basis is no more than speculation and conjecture and that an inference favorable to claimant which can be reached only on the basis of possibility or speculation is insufficient to support an award for claimant).

In the absence of a showing by Steineke to a reasonable medical certainty that her alleged damages were proximately caused by Share's alleged breach of contract, Steineke has failed in her burden to present evidence creating an issue of material fact in this matter. Share is therefore entitled to judgment as a matter of law, and the district court correctly sustained Share's

motion for summary judgment. This finding being dispositive of the appeal, it is not necessary for us to discuss any other issues raised by the parties.

CONCLUSION

Giving Steineke the benefit of all reasonable inferences deducible from the evidence, we find that there is no genuine issue of material fact and that Share is entitled to judgment as a matter of law. The order of the trial court sustaining Share's summary judgment motion is affirmed.

AFFIRMED.

WHITE, J., concurring.

The issue in this case is whether Steineke may recover damages representing the loss of her ability to conceive and bear children. I would recognize the loss of chance doctrine to the extent that it would allow recovery for the loss of the chance to conceive. I am, therefore, compelled to write separately from the majority opinion, and I concur only in its result.

The majority opinion necessarily recognizes loss of chance when the majority considers whether Steineke established a causal connection between appellee's breach and Steineke's alleged damages—the loss of the chance to conceive. To this extent, I respectfully contend that the opinion is inconsistent with its summary declaration that this jurisdiction will not recognize loss of chance as a cause of action or an element of damages in either contract or tort cases.

In this case, however, Steineke failed to present evidence raising a genuine issue of material fact that she had a chance to conceive and bear children. Specifically, Steineke could not establish to a reasonable degree of medical certainty that her fallopian tube could have been saved but for defendant's alleged breach. The inability to establish that the fallopian tube could have been saved eliminates Steineke's right to recover for the loss of the chance to conceive. In this respect I agree with the decision of the majority. If Steineke could have produced evidence of this element of her cause of action, I would hold that she should be allowed to recover for the loss of the chance to conceive.

WRIGHT, J., joins in this concurrence.

CAPORALE, J., dissenting.

In the first instance, I disagree with the majority's statement that this court has not recognized loss of chance as an element of damages in either tort or contract.

In *Washington v. American Community Stores Corp.*, 196 Neb. 624, 244 N.W.2d 286 (1976), a 24-year-old parole officer involved in a collision brought a personal injury action, claiming that his injuries prevented him from pursuing a wrestling career. While he had successfully competed in wrestling competitions at the high school and college levels and was characterized as a prime candidate for the U.S. Olympic team, there was no evidence that he would have been an Olympic wrestler or that he had been promised a job as a wrestling coach. This court nonetheless rejected the defendant's argument that the claim of damages was speculative and conjectural, as it rested on uncertain future possibilities and uncertain future happenings, and permitted the plaintiff to recover for the loss of earning capacity as a professional wrestler or coach.

Thus, it seems to me that wittingly or unwittingly, wisely or unwisely, this court has recognized loss of chance as an element of tort damages. Perhaps the majority opinion has, knowingly or otherwise, silently overruled *Washington*.

In any event, as I view it, this case does not turn on the loss of a chance to bear children. Share Health Plan of Nebraska, Inc., was obligated under its contract "to arrange to provide" Nancy Steineke "medical, surgical and hospital services and benefits," including "care for a Medical Emergency furnished by or under the order of a PLAN PHYSICIAN," which order could be "made retroactively if justified by the Medical Emergency." The contract defined medical emergency as

> the sudden onset of an illness or an accidental bodily injury subject to the following additional requirements.
>
> (a) The condition so treated must have required treatment of such immediate nature that the patient's life or health might have been jeopardized had he been taken to a PLAN PHYSICIAN.
>
> (b) The patient must have been in shock, or have been unconscious or incapable of rational, independent

judgment concerning the medical treatment or services rendered.

Steineke alleged that Share Health Plan breached its contract when its representative refused to authorize the medical services at Archbishop Bergan Mercy Hospital when Share Health Plan knew or should have known that such services were covered as a medical emergency. Furthermore, Steineke alleged that as a direct and proximate result, she sustained mental and physical pain and suffering and lost as well the ability to conceive and bear children in the future.

Although those allegations sound in contract, as the majority concludes, they also imply that Share Health Plan failed to act reasonably under the circumstances, thereby also stating a cause of action in tort. *Lawyers Title Ins. Corp. v. Hoffman*, 245 Neb. 507, 513 N.W.2d 521 (1994) (negligent failure to fulfill common-law duty to perform agreed-upon activity with care, skill, reasonable expediency, and faithfulness may be a tort as well as breach of contract).

The record reveals that at the time of the ultrasonic examination at Bergan Mercy, there was no free fluid in Steineke's "perineal cavity." However, by the time surgery was performed at the University of Nebraska Medical Center, there was blood in her abdomen. In the opinion of Dr. Robert Luby, the "implantation side of [Steineke's fallopian] tube" started bleeding between the time of the ultrasonic test at Bergan Mercy and the surgery at the medical center.

At this point in the proceedings and under the present state of the record, it must be inferred that the bleeding might have jeopardized Steineke's health or life and thus brought her condition within the definition of a medical emergency. See *Barta v. Kindschuh, ante* p. 208, 518 N.W.2d 98 (1994) (on appellate review, party against whom summary judgment granted given benefit of all reasonable inferences deducible from evidence).

While it appears that the majority takes some comfort from the fact that Steineke consented to the surgery performed at the medical center, the fact is that whatever import the consent form she signed might have as between the medical center and her, it has none as between Share Health Plan and her. Thus,

under the circumstances, I would hold Share Health Plan liable for all the consequences of its inappropriate insistence that Steineke be transferred to the medical center, including tort damages.

In *Wickline v. State*, 192 Cal. App. 3d 1630, 228 Cal. Rptr. 661 (1986), *republished* 239 Cal. Rptr. 810, a Medi-Cal recipient sued the State of California for negligent discontinuance of her Medi-Cal eligibility. The plaintiff's physician sought to extend her hospitalization to 8 days. However, a Medi-Cal utilization reviewer authorized only 4 days. Upon returning home, the plaintiff suffered complications that later required amputation of her leg. Although the state was not held liable due to the physician's failure to file another request for extension of hospital stay, the court left the door open for claims against third-party payors who make medically inappropriate decisions.

> The patient who requires treatment and who is harmed when care which should have been provided is not provided should recover for the injuries suffered from all those responsible for the deprivation of such care, including, when appropriate, health care payors. Third party payors of health care services can be held legally accountable when medically inappropriate decisions result from defects in the design or implementation of cost containment mechanisms . . . .

Wickline, 192 Cal. App. 3d at 1645, 239 Cal. Rptr. at 819.

Private third-party payors are potentially liable as well. In *Wilson v. Blue Cross of Southern Cal.*, 222 Cal. App. 3d 660, 271 Cal. Rptr. 876 (1990), a private insurer refused to authorize hospitalization for a patient suffering from depression, chemical dependency, and anorexia. The patient subsequently committed suicide. The California Court of Appeal reversed the trial court's summary judgment in favor of the defendants and held that there was substantial evidence that the insurer's decision not to approve hospitalization was a substantial factor in bringing about the patient's demise.

Accordingly, I would reverse the judgment of the district court and remand the cause for further proceedings.

LANPHIER, J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V. SCHUYLER DAWN, APPELLANT.

519 N.W.2d 249

Filed July 15, 1994. No. S-93-396.

1. **Pretrial Procedure: Prosecuting Attorneys: Witnesses.** Neb. Rev. Stat. § 29-1912(4) (Reissue 1989) provides that whenever a prosecuting attorney believes that the granting of an order under the provisions of this section will result in the possibility of bodily harm to witnesses or that witnesses will be coerced, the court may permit him or her to make such a showing in the form of a written statement to be inspected by the court alone.
2. **Criminal Law: Attorneys at Law: Appeal and Error.** Attorneys of record of the respective parties in the court below shall be deemed the attorneys of the same parties in an appellate court, until a withdrawal of appearance has been filed. Counsel in any criminal case pending in an appellate court may withdraw only after obtaining permission of the appellate court.
3. **Right to Counsel: Appeal and Error.** When an indigent defendant is deprived of his constitutional right to counsel by not being furnished an attorney to present his direct appeal to an appellate court, the defendant is not afforded an effective appeal, and the decision thereon is deemed a nullity.
4. **Right to Counsel: Courts: Appeal and Error.** After a defendant has perfected his or her direct appeal to an appellate court, if the defendant is without counsel, the appellate court, in its supervisory capacity and through its inherent power to do those things reasonably necessary for the administration of justice, may enter an order directing the trial court to appoint counsel to represent that defendant on direct appeal if the defendant asks that counsel be appointed and the defendant satisfactorily shows by affidavit to the district court that he or she is indigent.
5. **Prisoners: Probation and Parole: Evidence.** A person placed on probation, an inmate of any jail, or an inmate who has been released on parole, probation, or work release is prohibited from acting as an undercover agent or employee of any law enforcement agency of the state, and any evidence derived in violation of this rule is not admissible against any person in any proceeding whatsoever.
6. **Constitutional Law: Effectiveness of Counsel: Proof.** To state a claim of ineffective assistance of counsel as violative of the Sixth Amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution, and thereby obtain reversal of a conviction, a defendant must show that his or her counsel's performance was deficient and that such deficient performance prejudiced the defense, that is, demonstrate a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different.
7. **Pleas: Effectiveness of Counsel: Proof.** When a defendant has entered a guilty plea, counsel's deficient performance constitutes prejudice if the defendant shows with a reasonable probability that but for counsel's errors, the defendant would have insisted on going to trial rather than pleading guilty.
8. **Effectiveness of Counsel: Records: Appeal and Error.** Claims of ineffective assistance of counsel raised for the first time on direct appeal do not require dismissal ipso facto; the determining factor is whether the record is sufficient to adequately review the question. When the issue has not been raised or ruled on at

the trial court level and the matter necessitates an evidentiary hearing, an appellate court will not address the matter on direct appeal.

9. **Due Process: Prosecuting Attorneys: Evidence.** Irrespective of the good or bad faith of the prosecution, its suppression of evidence favorable to an accused violates due process if the evidence is material to either guilt or punishment.
10. **Constitutional Law: Prosecuting Attorneys: Evidence.** If the evidence is so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce, that duty arises even if no request is made. In such situations, if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed.
11. **Appeal and Error.** In the absence of plain error, when an issue is raised for the first time in an appellate court, the issue will be disregarded inasmuch as the trial court cannot commit error regarding an issue never presented and submitted for disposition in the trial court.
12. **Pretrial Procedure: Prosecuting Attorneys: Evidence.** In the typical case where a defendant makes only a general request for exculpatory material, it is the State that decides which information must be disclosed. Unless defense counsel becomes aware that other exculpatory evidence was withheld and brings it to the court's attention, the prosecutor's decision on disclosure is final.
13. **Appeal and Error.** Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.
14. **Convictions: Bail Bond.** Once a defendant has been convicted of the felony charged, he is not entitled to be released on bail; such determination is left to the discretion of the trial court, which may prescribe the amount of the bond and the conditions thereof if one is set.

Petition for further review from the Nebraska Court of Appeals, on appeal thereto from the District Court for Box Butte County, BRIAN SILVERMAN, Judge. Judgment of Court of Appeals affirmed.

Dean S. Forney, Box Butte County Public Defender, for appellant.

Schuyler Dawn, pro se.

Don Stenberg, Attorney General, Delores Coe-Barbee, and J. Kirk Brown for appellee.

Dennis R. Keefe, Lancaster County Public Defender, Michael D. Gooch, and Julie B. Hansen for amicus curiae Nebraska Criminal Defense Attorneys Association.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ.

FAHRNBRUCH, J.

Further review of Schuyler Dawn's appeal of his conviction for distribution of a controlled substance has been granted to remedy the failure of the lower courts to appoint counsel for Dawn's direct appeal and to address his claims that in the trial court (1) he received ineffective assistance of counsel, (2) the prosecutor failed to disclose information material to his defense, and (3) the trial court abused its discretion in setting his appeal bond.

The Nebraska Court of Appeals affirmed Dawn's conviction on direct appeal even though Dawn had not been afforded his constitutional right to counsel during his appeal. That affirmation is a nullity.

After appointing counsel for Dawn for his appeal to this court, after receiving briefs from the parties, after hearing arguments, and after our own review of Dawn's remaining assignments of error, we affirm Dawn's conviction.

FACTS

Dawn was charged by information with (1) criminal conspiracy, (2) two counts of distribution of a controlled substance, and (3) being a habitual criminal.

After Dawn's arraignment on an information in the district court for Box Butte County, his trial counsel filed a motion for discovery. Dawn asked, inter alia, for any "[r]eports prepared or statements given, either orally or in writing, by any law enforcement officers or any agent of the state . . . who participated in any way in the investigation or surveillance of the defendant at any time."

In connection with that motion, the State, pursuant to Neb. Rev. Stat. § 29-1912(4) (Reissue 1989), filed a confidential affidavit with the court. Section 29-1912(4) provides:

> Whenever the prosecuting attorney believes that the granting of an order under the provisions of this section will result in the possibility of bodily harm to witnesses or that witnesses will be coerced, the court may permit him or her to make such a showing in the form of a written statement to be inspected by the court alone.

In an affidavit filed in Dawn's case, a police official stated

that police investigatory reports contained information about a confidential informant who was not endorsed as a State's witness and a coconspirator who, at that time, was a fugitive. The official also stated his belief that Dawn might harm or coerce witnesses in this case. The official stated that in the past, he and other officers had received complaints from citizens that Dawn had threatened or physically harmed them. In cases police investigated, "it has been impossible to gather enough evidence to prosecute Schuyler for the offenses complained of because witnesses refuse to cooperate and testify against Schuyler Dawn." The official listed specific instances, some of which he observed and others which were reported to him, which led him to believe that Dawn "is a violent person capable of causing serious injury or death to a person who is a witness against him." The district court overruled Dawn's motion to produce the requested police reports.

Dawn's trial counsel later filed a motion to depose the informant used by law enforcement officers to apprehend Dawn. At the hearing on that motion, Dawn's trial counsel identified a person who he thought was the informant. The State would not verify that identification. The district court advised Dawn's trial counsel to contact the individual he identified and, if he refused to talk to Dawn's trial counsel, to issue a subpoena for the individual to testify at trial. The district court denied Dawn's trial counsel's motion to depose the alleged informant.

Dawn has not assigned as error the district court's overruling of his motion for discovery of the police reports or his motion to depose the State's informant.

On March 1, 1993, Dawn pled guilty to one count of distributing a controlled substance on January 24, 1992. In exchange for the plea, the State agreed to dismiss the other charges.

At the guilty plea hearing on March 1, the State recited the following facts upon which the charge was founded: On January 18, 1992, an individual involved in drug trafficking in western Nebraska (the confidential informant) went with an undercover law enforcement officer to a bar in Alliance and introduced the officer to Dawn. The three discussed whether

cocaine was available. Eventually, the officer saw Dawn meet and make an exchange with a fourth man behind the bar. Dawn then delivered cocaine to the officer, and the officer paid Dawn for it.

On January 22, the same confidential informant and officer met Dawn at his house. On that night, Dawn said he was again looking for cocaine. Dawn met with the same man he had met behind the bar, but was told that cocaine could not be obtained on such short notice.

On January 24, the officer met Dawn at a bar and observed him meet again with the man who had previously been involved in the cocaine deliveries to the officer. Immediately after that, Dawn placed a Kool cigarette package containing cocaine in the officer's hand, and the officer paid for it. It is not entirely clear from the prosecutor's recitation of facts at the plea hearing as to when the informant was present, if at all, during the controlled drug buy from Dawn on January 24. However, the police reports indicate that the confidential informant was present during the drug buy. Those reports are part of Dawn's presentence investigation report and were made available to Dawn's counsel prior to sentencing. At the sentencing hearing, Dawn's counsel advised the court that he had "gone over" the report with his client.

The prosecutor further stated at the plea hearing that both the officer and informant were wearing body microphones and that tapes of the conversations between the officer, the informant, and Dawn would have been introduced as evidence, together with corroboration from other officers who witnessed Dawn's activities on the days in question.

On April 13, 1993, after considering Dawn's presentence investigation report, the trial judge sentenced Dawn to not less than 5 nor more than 20 years' imprisonment.

Although Dawn's trial counsel had not filed a motion to withdraw as counsel at this point, Dawn proceeded pro se and timely filed a notice of appeal, a motion for permission to proceed in forma pauperis, a poverty affidavit, and a motion for appointment of counsel. All of these documents were filed at the same time on May 12 in the district court for Box Butte County. Dawn subsequently filed a motion for an appeal bond.

The district court sustained Dawn's motion to proceed in forma pauperis, appointed the public defender to represent Dawn on appeal, and set an appeal bond at $50,000 cash. Dawn filed a motion for reduction of the appeal bond, which the district court denied.

The prosecutor then filed a motion to set aside the court's order appointing the public defender as Dawn's counsel on appeal. No notice was given to Dawn of the motion or that it was set for hearing, although apparently notice was sent to Dawn's trial counsel and court-appointed public defender. Present at the hearing on this motion were the prosecutor, the judge, and Dawn's court-appointed public defender who had no objection to the motion to set aside his appointment. The district court granted the prosecutor's motion to set aside the appointment of the public defender on the ground that the court was without jurisdiction to enter the order after Dawn's appeal had been perfected to the Court of Appeals.

Dawn then filed several motions for appointment of counsel alternately in the Court of Appeals and district court, with each court determining that it had no jurisdiction to appoint counsel. By memorandum entry on February 9, 1994, the Court of Appeals affirmed Dawn's conviction. The entry stated, "Appeal considered and no need is present for a detailed opinion. See State v. Dixon, 237 Neb. 630, 467 N.W.2d 397 (1991). Conviction affirmed."

Dawn filed a petition for further review by the Supreme Court. The State joined in seeking further review. Upon consideration of Dawn's petition, we granted further review, appointed counsel to represent Dawn in this court, and granted leave for Dawn and the State to file briefs.

On May 12, 1994, Dawn's trial counsel, stating that he had not been retained or appointed to represent Dawn on appeal and that he had no involvement or connection with Dawn's appeal, belatedly filed a motion to withdraw as counsel. The Nebraska Criminal Defense Attorneys Association (NCDAA) filed a brief amicus curiae in support of Dawn's arguments regarding the failure of the lower courts to appoint counsel for Dawn on direct appeal. The only issue commented upon by NCDAA is that the district court and Court of Appeals erred in

not appointing Dawn counsel on direct appeal in violation of his rights under the U.S. and Nebraska Constitutions.

ASSIGNMENTS OF ERROR

Summarized and restated, Dawn assigns as error that (1) the Court of Appeals erred in refusing to appoint him counsel on direct appeal, (2) he received ineffective assistance of counsel because his trial counsel failed to investigate the State's use of a county jail inmate as an undercover agent and because trial counsel failed to file a motion to suppress all evidence derived from that informant, (3) his right to due process was violated by prosecutorial misconduct because the prosecutor failed to disclose that the State used an inmate as an undercover agent to apprehend Dawn, and (4) the district court abused its discretion by setting a $50,000 appeal bond for an indigent defendant.

ANALYSIS

APPOINTMENT OF COUNSEL

The rules of practice and procedure for the Nebraska Supreme Court and Court of Appeals provide in substance that the attorneys of record of the respective parties in the court below shall be deemed the attorneys of the same parties in an appellate court, *until a withdrawal of appearance has been filed. Counsel in any criminal case pending in this court may withdraw only after obtaining permission of the appellate court.* See Neb. Ct. R. of Prac. 1F(1) (rev. 1993).

Dawn's trial counsel filed a motion to withdraw as counsel on May 12, 1994, after this court appointed counsel for Dawn on his petition for further review of his case here. We granted trial counsel's motion to withdraw, but take this opportunity to remind trial attorneys of the foregoing court rule and their duty to fulfill their responsibilities to clients on appeal.

In this case, Dawn's trial counsel violated the foregoing rule by purporting to withdraw from Dawn's criminal case without filing a motion to withdraw and without obtaining permission from the Court of Appeals after Dawn perfected his appeal to that court.

Dawn's right to counsel on direct appeal was, therefore, violated when he was forced to proceed with his direct appeal

pro se. It is beyond dispute that upon showing that he was an indigent and upon his request for counsel, Dawn had the right to appointed counsel for his direct appeal. See, *Evitts v. Lucey*, 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985); *Douglas v. California*, 372 U.S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963). When an indigent defendant is deprived of his constitutional right to counsel by not being furnished an attorney to present his direct appeal to an appellate court, the defendant is not afforded an effective appeal, and the decision thereon is deemed a nullity. See *State v. Blunt*, 197 Neb. 82, 246 N.W.2d 727 (1976).

We have remedied this defect in this case by granting Dawn's petition for further review and, through our inherent power to do those things reasonably necessary for the administration of justice in the exercise of our jurisdiction, by appointing counsel to represent Dawn on appeal to this court. See *Kovarik v. County of Banner*, 192 Neb. 816, 224 N.W.2d 761 (1975).

Nevertheless, the question remains unresolved as to which level of the judicial branch has jurisdiction to appoint counsel for an indigent defendant in circumstances similar to Dawn's. Because this situation affects the public interest and is capable of repetition, yet evading review, we now resolve that question. See *Williams v. Hjorth*, 230 Neb. 97, 430 N.W.2d 52 (1988).

Without representation from his trial counsel and upon filing his notice of appeal, Dawn became trapped in a procedural Catch-22. When Dawn sought appointment of counsel from the district court, that court denied his motion based on the rule that upon perfection of an appeal to an appellate court, the district court loses jurisdiction. See *Zeeb v. Delicious Foods*, 231 Neb. 358, 436 N.W.2d 190 (1989). When Dawn sought appointment of counsel from the Court of Appeals, that court followed the usual appellate court practice of overruling such motions without prejudice to refile the request for counsel in the district court.

Because the district court has explicit statutory authority under Neb. Rev. Stat. § 29-3901 et seq. (Cum. Supp. 1992) to appoint counsel for indigent defendants, our appellate courts have in the past followed the practice that the Court of Appeals employed in this case. We now modify that practice and hold

that after a defendant has perfected his or her direct appeal to an appellate court, if the defendant is without counsel, the appellate court, in its supervisory capacity and through its inherent power to do those things reasonably necessary for the administration of justice, may enter an order directing the trial court to appoint counsel to represent that defendant on direct appeal if the defendant asks that counsel be appointed and the defendant satisfactorily shows by affidavit to the district court that he or she is indigent. See *Kovarik, supra*.

We now turn to Dawn's remaining assignments of error.

INEFFECTIVE ASSISTANCE OF COUNSEL

Dawn argues that his trial counsel failed to investigate whether the State, in violation of Neb. Rev. Stat. § 29-2262.01 (Reissue 1989), used an inmate as an undercover agent or employee of the state. We note that there is nothing in the record or presentence investigation showing that the State violated § 29-2262.01. That section provides, in substance, that a person placed on probation, an inmate of any jail, or an inmate who has been released on parole, probation, or work release is prohibited from acting as an undercover agent or employee of any law enforcement agency of the state and that any evidence derived in violation of this rule is not admissible against any person in any proceeding whatsoever.

Dawn argues that if his trial counsel had conducted an investigation, he would have discovered that the State's informant was a jail inmate at the time he was used in the State's investigation and apprehension of Dawn and that all evidence derived from the informant could have been suppressed. Dawn further argues that his guilty plea was not voluntary because, if his trial counsel had moved to suppress the evidence under § 29-2262.01, he would not have pled guilty, but would have insisted on going to trial.

To state a claim of ineffective assistance of counsel as violative of the Sixth Amendment to the U.S. Constitution and article I, § 11, of the Nebraska Constitution and thereby obtain reversal of a conviction, a defendant must show that his or her counsel's performance was deficient and that such deficient performance prejudiced the defense, that is, demonstrate a

reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *State v. Lindsay, ante* p. 101, 517 N.W.2d 102 (1994); *State v. Gibbs*, 238 Neb. 268, 470 N.W.2d 558 (1991).

When a defendant has entered a guilty plea, counsel's deficient performance constitutes prejudice if the defendant shows with a reasonable probability that but for counsel's errors, the defendant would have insisted on going to trial rather than pleading guilty. *State v. Johnson*, 243 Neb. 758, 502 N.W.2d 477 (1993).

We first note that Dawn did not raise his claim of ineffective assistance of counsel at the trial court level. Claims of ineffective assistance of counsel raised for the first time on direct appeal do not require dismissal ipso facto; the determining factor is whether the record is sufficient to adequately review the question. *State v. Morley*, 239 Neb. 141, 474 N.W.2d 660 (1991). When the issue has not been raised or ruled on at the trial court level *and the matter necessitates an evidentiary hearing*, an appellate court will not address the matter on direct appeal. See, *State v. Morley, supra*; *State v. Dixon*, 223 Neb. 316, 389 N.W.2d 307 (1986).

The record before this court is insufficient to adequately review the question. The record fails to disclose what Dawn's trial counsel did or did not do to investigate the possibility that the State's informant was on probation, a jail inmate, or an inmate released on parole, probation, or work release at the time he was used in the investigation and arrest of Dawn.

The record does show that Dawn's trial counsel filed a motion for discovery of any reports of the police or agents of the State who participated in the investigation of Dawn and that he later filed a motion to depose the State's informant. The record does not disclose that Dawn's trial counsel filed these motions because he was seeking information as to the informant's status as a jail inmate.

When Dawn's trial counsel sought to depose the State's informant, the district court suggested that he interview the individual he thought was the informant and, if that individual refused to talk, issue him a subpoena to testify at trial. The record does not disclose whether Dawn's trial counsel

interviewed that individual. Nor does the record show whether Dawn's trial counsel pursued any other investigation of the informant or the informant's possible status as a jail inmate. The record is silent as to whether Dawn's trial counsel interviewed or attempted to take the deposition of the principal undercover law enforcement officer to determine whether his confidential informant was in jail, on probation, on parole, or on work release when he assisted the officer in receiving a delivery of cocaine from Dawn. Therefore, we are unable to review Dawn's claim that his trial counsel's performance was deficient.

Even if we could determine whether Dawn's trial counsel's performance was deficient, the record contains no information showing that Dawn was prejudiced by his counsel's failure to investigate the informant's status as set forth in § 29-2262.01. The record does not show that the state's confidential informant was on probation, a jail inmate, or an inmate released on parole, probation, or work release *at the time the confidential informant was used in the State's investigation and apprehension of Dawn*. Nor does the record disclose what basis, if any, Dawn has for suspecting that the informant was used in violation of § 29-2262.01 at that time.

During the hearing on Dawn's motion to depose the State's confidential informant, the prosecutor stated that the person Dawn alleged to be the informant was in jail *at the time of the hearing*. In his brief to this court, Dawn highlights this statement. However, that hearing was held more than a year after Dawn's arrest. Evidence that the alleged informant was in jail at that time provides no basis for determining that the confidential informant was on probation, a jail inmate, or an inmate released on parole, probation, or work release at the time of his involvement around the time Dawn was alleged to have committed the crimes referred to in this case.

Without such evidence in the record, we cannot determine with reasonable probability whether any failure of Dawn's trial counsel to investigate the matter prejudiced Dawn such that, but for his counsel's alleged failure to investigate, Dawn would have insisted on going to trial rather than pleading guilty.

We find that the record in this case is insufficient to

adequately review on direct appeal Dawn's claim of ineffective assistance of counsel at the trial level. Because the issue was not raised or ruled on by the trial court and the matter necessitates an evidentiary hearing, we will not address the matter further on direct appeal.

PROSECUTORIAL MISCONDUCT

Dawn also argues that his due process rights were violated because the prosecutor failed to disclose that the State's informant was a jail inmate at the time of the investigation.

In *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), the U.S. Supreme Court held that irrespective of the good or bad faith of the prosecution, its suppression of evidence favorable to an accused violates due process if the evidence is material to either guilt or punishment. See *State v. Boppre*, 243 Neb. 908, 503 N.W.2d 526 (1993).

Dawn did not make a specific request for information regarding the status of the State's confidential informant at the time of the crime with which Dawn was convicted, nor did he request *Brady* material in general. Nevertheless, the U.S. Supreme Court has stated that if the evidence is so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce, that duty arises even if no request is made. *United States v. Agurs*, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976). In such situations, if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. *Id.*

Section 29-2262.01 prohibits law enforcement agencies from using as undercover agents persons on probation, inmates of any jail, or inmates released on parole, probation, or work release. In this case, the State used an informant to introduce an undercover officer to Dawn for the purpose of making controlled drug purchases. In addition, the informant wore a microphone during these encounters to obtain evidence for use against Dawn.

Assuming, without deciding, that the State's use of this informant violated § 29-2262.01, any evidence derived from that informant would be inadmissible. Therefore, evidence that the State violated § 29-2262.01 would constitute evidence

material to Dawn's guilt or innocence because most, if not all, of the State's evidence against Dawn apparently was derived from the State's use of its confidential informant. Dawn, however, never raised this issue at the trial court level. In the absence of plain error, when an issue is raised for the first time in an appellate court, the issue will be disregarded inasmuch as the trial court cannot commit error regarding an issue never presented and submitted for disposition in the trial court. *State v. Huebner*, 245 Neb. 341, 513 N.W.2d 284 (1994).

The record before this court shows that Dawn apparently attempted to discover the identity of the informant, first through a motion to obtain police reports and then through a motion to depose the informant. The record fails to show that Dawn filed these motions because he was seeking information as to the informant's status as a jail inmate, probationer, parolee, or an inmate on work release or information of the prosecutor's failure to disclose such information. The record fails to reflect that Dawn presented the issue for disposition to the trial court or that Dawn even suggested that he suspected the prosecutor had failed to disclose information in violation of *Brady*.

Our rule precluding appellate courts from reviewing issues not raised at the trial court level is consistent with the usual duties of the prosecutor, defense counsel, and court with regard to *Brady* material. The U.S. Supreme Court has stated that in the typical case where a defendant makes only a general request for exculpatory material under *Brady*, it is the State that decides which information must be disclosed. Unless defense counsel becomes aware that other exculpatory evidence was withheld *and brings it to the court's attention*, the prosecutor's decision on disclosure is final. *Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987).

Because Dawn never presented the issue to the trial court, we must disregard this issue in the absence of plain error. Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process. See *State v. Flye*, 245 Neb. 495, 513 N.W.2d 526 (1994). In this case, the record contains nothing to show that the prosecutor failed

to disclose that the State used an informant in violation of § 29-2262.01. As stated in our discussion of Dawn's ineffectiveness of counsel claim, the record fails to disclose any evidence that the State's informant was on probation, a jail inmate, or an inmate released on parole, probation, or work release at the time he was used in the State's investigation and apprehension of Dawn. Without such evidence in the record, we cannot find plain error on the record to support a finding that the prosecutor failed to disclose material information in violation of *Brady*.

APPEAL BOND

Dawn argues that the district court abused its discretion by setting an appeal bond in the amount of $50,000 cash for an indigent. Once a defendant has been convicted of the felony charged, he is not entitled to be released on bail; such determination is left to the discretion of the trial court, which may prescribe the amount of the bond and the conditions thereof if one is set. See, Neb. Rev. Stat. § 29-2303 (Reissue 1989); *State v. Woodward*, 210 Neb. 740, 316 N.W.2d 759 (1982).

Dawn was convicted of a Class III felony, which carries a penalty of up to 20 years' imprisonment, a $25,000 fine, or both. See Neb. Rev. Stat. §§ 28-416 (Cum. Supp. 1992) and 28-105 (Reissue 1989). In addition, the record shows that in two prior cases, Dawn had failed to appear after being released on bail in each case. Under these circumstances, we find no abuse of discretion in the district court's decision to set the appeal bond at $50,000 cash.

CONCLUSION

Until this court appointed counsel for Dawn, he was denied his constitutional right to counsel on direct appeal. We hold that after a defendant has perfected his or her direct appeal to an appellate court, if the defendant is without counsel, the appellate court, in its supervisory capacity and through its inherent power to do those things reasonably necessary for the administration of justice, may enter an order directing the trial court to appoint counsel to represent that defendant on appeal if the defendant asks that counsel be appointed and the

defendant satisfactorily shows by affidavit to the district court that he or she is indigent.

We further find that the record in Dawn's case is inadequate to review on direct appeal his claim of ineffectiveness of counsel. Because he failed to present the issue of prosecutorial misconduct to the trial court and because the record is insufficient to support a finding of plain error on this issue, we also are unable to find that the prosecutor violated Dawn's due process rights by failing to disclose material information. Finally, we find no abuse of discretion in the district court's decision to set Dawn's appeal bond at $50,000 cash. Therefore, the trial court's judgment is in all respects affirmed.

AFFIRMED.

DANIEL HENRY, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFF, V. DAWN E. ROCKEY, TREASURER OF THE STATE OF NEBRASKA, ET AL., DEFENDANTS.

518 N.W.2d 658

Filed July 15, 1994. No. S-93-828.

1. **Constitutional Law: Statutes: Proof.** The burden of establishing the unconstitutionality of a statute is on the one attacking its validity.
2. _____: _____: _____. The unconstitutionality of a statute must be clearly demonstrated before a court can declare the statute unconstitutional, and all reasonable doubts will be resolved in favor of its constitutionality.
3. **Claims: Legislature.** As to claims approved by the State Claims Board in excess of $10,000, the Legislature has two affirmative duties: (1) to review the claim and (2) to make an appropriation for the claim if appropriate.
4. **Constitutional Law: Statutes: Special Legislation.** A legislative act violates Neb. Const. art. III, § 18, as special legislation in one of two ways: (1) by creating a totally arbitrary and unreasonable method of classification or (2) by creating a permanently closed class.
5. **Statutes: Special Legislation.** The test for statutes challenged under the special-laws prohibitions is that they must bear a reasonable and substantial relation to the object sought to be accomplished by the legislation.
6. **Equity.** Equity follows the law.
7. **Legislature.** The Legislature is not vested with unlimited power to make appropriations.

8. _____. The purpose of an appropriation bill is to make provision for lawfully taking money out of the state treasury.
9. _____. The Legislature is empowered to make appropriations to meet the legal obligations of the state.
10. _____. The Legislature is not empowered to make appropriations for purely charitable purposes.
11. **Attorney Fees.** Attorney fees and expenses may be recovered only where provided for by statute, or where the uniform course of procedure has been to allow such a recovery.

Original action. Judgment for plaintiff.

Paula B. Hutchinson and, on brief, David Edward Cygan, for plaintiff.

Don Stenberg, Attorney General, and Lisa D. Martin-Price for defendants.

John W. DeCamp, of DeCamp Legal Services, P.C., for amicus curiae Commonwealth State Securities American Savings Litigation Committee.

HASTINGS, C.J., WHITE, CAPORALE, FAHRNBRUCH, and LANPHIER, JJ., HANNON, Judge, and BLUE, District Judge.

PER CURIAM.

This is an original class action wherein Daniel Henry, a Nebraska resident taxpayer, challenges the constitutionality of 1993 Neb. Laws, L.B. 657. In that law, the Legislature appropriated a total of $16.5 million over 4 bienniums to reimburse depositors of the failed Commonwealth Savings Company, State Security Savings Company, and American Savings Company (hereinafter, collectively, Commonwealth creditors).

We find L.B. 657 to be unconstitutional special legislation in violation of Neb. Const. art. III, § 18.

FACTS

The following facts have been stipulated by the parties:

On November 1, 1983, the Nebraska Department of Banking and Finance closed Commonwealth Savings Company and placed it in receivership. The district court for Lancaster County appointed the Department of Banking and Finance as receiver. Two other industrial loan and investment companies,

State Security Savings Company and American Savings Company, have sought protection under the Bankruptcy Code but have not been placed into receivership as of the date of a stipulation of facts filed by the parties in this case.

Deposits in the three failed industrial loan companies were insured by the Nebraska Depository Institution Guaranty Corporation (NDIGC), created pursuant to the Nebraska Depository Institution Guaranty Act, Neb. Rev. Stat. § 21-17,127 et seq. (Reissue 1991). This act has not been repealed.

On January 4, 1985, the NDIGC surrendered all of its assets to the Commonwealth receiver, and thereafter had no assets to fulfill its guarantees of deposits. Various types of claims and lawsuits then ensued on behalf of the Commonwealth creditors. Eventually, a compromise amount of $8.5 million was approved for payment of a tort claim of the Commonwealth creditors against the State, and the Legislature appropriated that amount for payment to the Commonwealth receivership. The amount was paid in September 1985.

In return for the payment, both the district court for Lancaster County and the Legislature required the Commonwealth receiver to execute a release of "any and all claims and causes of action on behalf of the receivership and Commonwealth's depositors and creditors which they might have to that point against the State or the State's officers and employees arising out of the Commonwealth collapse, the regulation of Commonwealth and the NDIGC."

In 1990, the Legislature appropriated an additional $33.8 million for Commonwealth depositors. That appropriation was declared unconstitutional. See *Haman v. Marsh*, 237 Neb. 699, 467 N.W.2d 836 (1991).

On January 25, 1991, the Commonwealth creditors filed a claim with the Office of Risk Management under Nebraska's State Tort Claims Act, Neb. Rev. Stat. § 81-8,209 et seq. (Reissue 1987 & Cum. Supp. 1990). On August 13, 1992, the claimants filed a letter requesting that the previously filed tort claim in the amount of $100,902,500 be converted into a miscellaneous claim, which then became claim No. 91-310, under the State Miscellaneous Claims Act, Neb. Rev. Stat.

§ 81-8,294 et seq. (Cum. Supp. 1992).

On November 16, 1992, the State Claims Board approved the claim in the amount of $16.5 million and forwarded its decision to the Legislature for review and appropriation of funds. The Ninety-third Legislature, First Session, enacted L.B. 657 for payment of miscellaneous items of indebtedness in claim No. 91-310. L.B. 657 appropriated (1) $11,100 from the General Fund for "FY1993-94," (2) $11,100 from the General Fund for "FY1994-95," and (3) an additional $16,477,800 from the General Fund, to be disbursed in equal amounts over the following 3 bienniums if the act is challenged in court and upheld as constitutional. L.B. 657 was approved by the Governor on June 7, 1993, and had an operative date of July 1.

On August 23, 1993, Daniel Henry, individually and on behalf of all others similarly situated, filed in this court an "Application for Leave to Commence an Original Action" pursuant to Neb. Const. art. V, § 2. Plaintiff's application was sustained on September 22. Upon application of plaintiff, this court issued a temporary restraining order on October 7 prohibiting the disbursement of funds appropriated pursuant to L.B. 657 until further order of the court.

In his "Original Verified Petition for Declaratory and Injunctive Relief," plaintiff challenges the constitutionality of L.B. 657, requests permanent injunctive relief, and requests an award of attorney fees and costs. Dawn E. Rockey, Treasurer of the State of Nebraska; Lawrence S. Primeau, director of the Department of Administrative Services of the State of Nebraska; and James A. Hansen, director of the Department of Banking and Finance of the State of Nebraska, were named as defendants in their official capacities.

The Commonwealth State Securities American Savings Litigation Committee also filed a brief as amicus curiae in support of defendants.

ISSUES PRESENTED

The issues defined by plaintiff's petition in this original action are whether L.B. 657 is (1) special legislation in violation of article III, § 18, of the Nebraska Constitution; (2) an appropriation in excess of the biennium in violation of article

III, § 22, of the Nebraska Constitution; and (3) an unconstitutional delegation of legislative authority to the judiciary.

STANDARD OF REVIEW

The burden of establishing the unconstitutionality of a statute is on the one attacking its validity. *Bamford v. Upper Republican Nat. Resources Dist.*, 245 Neb. 299, 512 N.W.2d 642 (1994). The unconstitutionality of a statute must be clearly demonstrated before a court can declare the statute unconstitutional, and all reasonable doubts will be resolved in favor of its constitutionality. *In re Applications A-16027 et al.*, 242 Neb. 315, 495 N.W.2d 23 (1993).

ANALYSIS

SPECIAL LEGISLATION

Plaintiff contends that L.B. 657 represents the Legislature's attempt to circumvent this court's decision in *Haman v. Marsh*, 237 Neb. 699, 467 N.W.2d 836 (1991), and to do indirectly what it could not do directly, as indicated by the legislative history of the bill. Plaintiff argues that L.B. 657 is special legislation both because it creates a totally arbitrary and unreasonable method of classification and because it was enacted for the benefit of a closed class, the Commonwealth creditors being a class permanently closed to future members. Plaintiff claims that the taking of money from one class to pay the claims of another class is a violation of the due process and equal protection rights guaranteed by the federal and state Constitutions.

Defendants seek to distinguish the present case from *Haman* by arguing that L.B. 657 is not a substantive bill, but merely an appropriations bill enacted to pay claim No. 91-310 pursuant to the State Miscellaneous Claims Act, § 81-8,294 et seq. Therefore, they reason, L.B. 657 cannot constitute special legislation. Defendants urge that it is the State Miscellaneous Claims Act which the court must find to be unconstitutional special legislation before the court can find L.B. 657 to be unconstitutional. Thus, our first inquiry must be whether L.B. 657 may constitute special legislation.

We note that 1990 Neb. Laws, L.B. 272A, which this court

found unconstitutional in *Haman*, was also an appropriations bill. Defendants cite no authority for the proposition that an appropriations bill cannot constitute special legislation, nor has our research revealed any such authority. In fact, the express language of the State Miscellaneous Claims Act, as applied to L.B. 657, indicates otherwise.

The appropriation of funds by L.B. 657 is governed by the terms of the State Miscellaneous Claims Act. Section 81-8,300 gives the State Claims Board the authority to approve claims. However, § 81-8,300 requires that claims in excess of $10,000 "*shall be reviewed* by the Legislature and an appropriation made therefor *if appropriate*." (Emphasis supplied.)

At least as to claims approved by the State Claims Board in excess of $10,000, the Legislature has two affirmative duties: (1) to review the claim and (2) to make an appropriation for the claim if appropriate. The language of § 81-8,300 is mandatory as to these duties. Because claim No. 91-310 was for an amount in excess of $10,000, it was mandatory for the Legislature to review the claim and determine whether an appropriation to pay the claim was appropriate. That being so, L.B. 657 represents more than the Legislature's rubberstamp of the State Claims Board's recommendation to pay claim No. 91-310.

Obviously, the passage of L.B. 657 indicates that the Ninety-third Legislature was in substantive agreement with the decision of the State Claims Board, i.e., the Legislature reviewed claim No. 91-310 and found payment of the claim to be appropriate. That the Legislature did exactly that is confirmed by L.B. 657, § 1, which states that "[t]he Legislature . . . finds that further reimbursement of the depositors' financial losses *is warranted*." (Emphasis supplied.)

For the above reasons, we disagree with defendants that L.B. 657 cannot be considered to be special legislation because it is not substantive. Any attempt to distinguish this case from *Haman* on that basis must fail.

L.B. 657 seeks to authorize payments to the same group of people as did L.B. 272A, that is, the depositors of the Commonwealth Savings Company, State Security Savings Company, and American Savings Company. Thus, to determine whether L.B. 657 is special legislation in violation of

Neb. Const. art. III, § 18, we need look no further than our holding in *Haman*.

A legislative act violates Neb. Const. art. III, § 18, as special legislation in one of two ways: (1) by creating a totally arbitrary and unreasonable method of classification or (2) by creating a permanently closed class. *Haman v. Marsh*, 237 Neb. 699, 467 N.W.2d 836 (1991). The test for statutes challenged under the special-laws prohibitions is that they must bear a reasonable and substantial relation to the object sought to be accomplished by the legislation. *Id.*

In *Haman*, defendants argued that although the State had no legal obligation to reimburse the Commonwealth creditors, it had a moral obligation to do so. In that case, we stated that

> a moral obligation attaches when there is "a law [which] is passed notifying and warning the taxpayer and the citizen generally that the state . . . will undertake the burden of such damages." Nowhere in the NDIGC legislation was such a notification or warning present. In fact, the NDIGC act provides that "[n]o state funds of any kind shall be allocated or paid to the corporation." Neb. Rev. Stat. § 21-17,135(4) (Reissue 1987).

Haman v. Marsh, 237 Neb. at 714, 467 N.W.2d at 847.

We concluded that the State had no moral obligation to pay the claims of the Commonwealth creditors, and for that reason, it was not necessary for us to reach the question of whether moral obligation would provide reasonable and substantial support for the classification in question. We then held that L.B. 272A, authorizing payments from the state treasury to Commonwealth creditors, created a totally arbitrary and unreasonable method of classification and also created a permanently closed class, and thus was special legislation under both prongs of the test.

In this case, defendants argue that an award pursuant to the Miscellaneous Claims Act is an *equitable* remedy which permits the Legislature to consider any valid claim against the State which cannot be pursued elsewhere. Defendants state that the Legislature has the "broad equitable jurisdiction" to do this, brief for defendants at 28, analogous to the equitable jurisdiction of the courts. Again, defendants cite no authority

for this novel proposition. Assuming arguendo that the Legislature does possess some broad equitable power analogous to that of the judicial branch, we remind defendants of the maxim that "equity follows the law." See *Miller v. School Dist. No. 69*, 208 Neb. 290, 296, 303 N.W.2d 483, 488 (1981).

The powers of the Nebraska Legislature are legally derived from Neb. Const. art. III. The Legislature is specifically empowered to make appropriations for the expenses of the government. See Neb. Const. art. III, § 22. However, the Legislature is not vested with unlimited power to make appropriations. "The purpose . . . of an appropriation bill is to make provision for *lawfully* taking money out of the state treasury . . . ." (Emphasis supplied.) *Rein v. Johnson*, 149 Neb. 67, 78, 30 N.W.2d 548, 556 (1947), *cert. denied* 335 U.S. 814, 69 S. Ct. 31, 93 L. Ed. 369 (1948).

The Legislature is empowered to make appropriations to meet the legal obligations of the state. See, *Haman v. Marsh, supra*; *Weaver v. Koehn*, 120 Neb. 114, 231 N.W.2d 703 (1930). The Legislature is *not* empowered to make appropriations for purely charitable purposes. See *Weaver v. Koehn, supra*.

Nowhere in their brief do defendants contend that the Legislature has a legal duty to reimburse the Commonwealth creditors for their losses. In fact, defendants concede that no legal remedies are available to reimburse the Commonwealth creditors. Therefore, the Legislature's right to appropriate state funds for that purpose must be grounded, if at all, in moral obligation.

As previously noted, this court has already determined in *Haman* that the State has no moral obligation to reimburse the Commonwealth creditors. Thus, even if a moral obligation would provide a reasonable and substantial support for the classification in question, a matter we do not decide, we can only conclude that the Legislature's enactment of L.B. 657 constitutes an act of charity on the part of the State toward the Commonwealth creditors.

Once again we declare, as we have for more than 60 years, that " '[c]*learly it has not yet come to pass that the state, in its supervision of the banking business, has become an eleemosynary institution.*' " (Emphasis supplied.) *Haman v.*

Marsh, 237 Neb. at 715, 467 N.W.2d at 848. Accord *Weaver v. Koehn, supra. The purse strings of this state are not open for the purpose of simply giving money away.*

We now hold, adhering to our analysis in *Haman*, that L.B. 657's authorizing payments from the state treasury to the Commonwealth creditors creates an arbitrary and unreasonable method of classification, that it creates a permanently closed class, and that it is therefore unconstitutional special legislation in violation of Neb. Const. art. III, § 18.

Having determined that L.B. 657 is constitutionally infirm as special legislation, we find it unnecessary to reach the other constitutional issues raised by the plaintiff. We have also considered the arguments raised by the amicus curiae in its brief and find them unpersuasive.

ATTORNEY FEES

Plaintiff requests attorney fees and costs for the services of his attorneys in this case. Attorney fees and expenses may be recovered only where provided for by statute, or where the uniform course of procedure has been to allow such a recovery. *Rosse v. Rosse*, 244 Neb. 967, 510 N.W.2d 73 (1994).

Neb. Rev. Stat. § 24-204.01 (Reissue 1989) provides in relevant part:

> When an original action is instituted in the Supreme Court by or against the state, or any office, department, or officer thereof, involving the constitutionality of any act of the Legislature no matter when such act was passed, attorney fees and costs may be allowed if any of the following conditions set forth in subdivision (1), (2), or (3) of this section are found to exist:
>
> (1)(a) The action challenges the constitutionality of an act which the Attorney General has previously ruled constitutional or unconstitutional or as to which he has made no ruling . . . .

In this case, the Attorney General has made no ruling on the constitutionality of L.B. 657. Therefore, the necessary conditions for the awarding of attorney fees and costs have been met, and plaintiff is entitled to attorney fees.

CONCLUSION

L.B. 657 is special legislation which unconstitutionally appropriates state funds in violation of Neb. Const. art. III, § 18. Judgment is entered for plaintiff and against defendants and each of them in their official capacities. The Treasurer of the State of Nebraska is hereby permanently enjoined from disbursing on behalf of the State of Nebraska any funds appropriated by 1993 Neb. Laws, L.B. 657, to depositors of any former industrial loan and investment companies, and the director of the Department of Administrative Services of the State of Nebraska and the director of the Department of Banking and Finance of the State of Nebraska are enjoined from implementing the provisions of L.B. 657.

Plaintiff is awarded $13,164.27 for attorney fees and expenses pursuant to § 24-204.01, in addition to costs of this action.

JUDGMENT FOR PLAINTIFF.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. MICHAEL D. CARPER, RESPONDENT.

518 N.W.2d 656

Filed July 15, 1994. No. S-93-930.

Original action. Judgment of disciplinary sanctions.

HASTINGS, C.J., BOSLAUGH, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ.

PER CURIAM.

On October 19, 1993, formal disciplinary charges were filed against the respondent, Michael D. Carper. Carper subsequently filed a conditional admission in exchange for a stated form of consent judgment of discipline. See Neb. Ct. R. of Discipline 13 (rev. 1992). We accept Carper's conditional admission and impose discipline.

Carper has conditionally admitted the following:

Carper was admitted to the Nebraska State Bar Association in September 1986. At all relevant times he was engaged in the private practice of law in Kearney, Nebraska.

In January 1991, Carper entered into a contingency employment agreement with his then roommate, Jeffrey S. Grant. Carper was to represent Grant with regard to injuries Grant sustained in a motor vehicle accident. At the time of the accident, Grant was a passenger in a car driven by Shannon Sullivan. The accident was allegedly caused by Allison Markham. This disciplinary action concerns Carper's handling of settlement checks issued by Sullivan's and Markham's insurers.

In June 1991, a settlement check was issued by Sullivan's insurer. The draft was in the amount of $1,000 and was payable to "Jeff Grant." On July 6, Carper endorsed Grant's name on the back of the settlement draft. Carper did not have Grant's written permission to make this endorsement; instead, he relied on the authority of Neb. Rev. Stat. § 7-107 (Reissue 1991). Carper placed the proceeds of the draft into his trust account. On July 25, Carper issued a check from his trust account. The check was in the amount of $666.67 and was payable to Grant.

On August 27, Carper advised Grant that Markham's insurer had made a net settlement offer of $7,000. Grant agreed to accept the offer at that time, believing that $7,000 was the gross settlement, not including the $1,000 previously received. That same day Markham's insurer issued a check in the amount of $11,000, payable to "Jeff Grant an individual and Michael Carper his Attorney."

On August 28, Carper endorsed Grant's name on this second check. Carper did not have Grant's written permission to make this endorsement; he again relied on the authority of § 7-107. Carper placed the proceeds of the check into his trust account. At the time he endorsed the check, Carper also endorsed a form entitled "Final Release of All Claims." Carper signed Grant's name to the release and signed his own name as "witness." Carper had Grant's express permission to sign Grant's name on this form.

On August 29, Carper issued a check to Grant in the amount

of $4,470.73. This amount represented $7,000 less $500 in attorney fees to Carper and less $2,029.27 in medical expenses. Carper advised Grant that he would attempt to negotiate a reduction in the payments owing to the medical care providers.

On September 5, at Grant's request, Carper issued Grant a check in the amount of $2,043.96. Carper advised Grant that Grant should proceed to pay all medical expenses with those funds.

On October 1, Grant called Markham's insurer and was told that the gross amount of the settlement was $11,000. Grant then spoke with Carper about this information. Carper issued Grant a check, from his attorney trust account, in the amount of $4,000. There is a genuine disagreement between Grant and Carper as to the reason for this $4,000 payment.

On May 8, 1992, Carper filed a civil lawsuit against Grant for the recovery of his attorney fees in this matter. This lawsuit was settled prior to the hearing before the Committee on Inquiry of the Sixth Disciplinary District.

Carper's actions, as set forth above, establish that he allowed the personal relationship between himself and Grant to negatively affect his professional and business judgment. As a result, Carper's conduct subjected the profession, as well as himself, to undue scrutiny and criticism by the public. Carper's conduct constitutes a violation of his oath of office and a violation of Canon 1, DR 1-102(A)(1), (4), and (6), and Canon 9, DR 9-102(B)(1) and (3), of the Code of Professional Responsibility.

Accepting Carper's conditional admission, we impose the following disciplinary measures:

(1) Carper, having violated a disciplinary rule and having failed to act competently in a matter entrusted to him, is guilty of unprofessional conduct and is hereby publicly reprimanded for conduct violative of the Code of Professional Responsibility and of his oath as a member of the bar of this court.

(2) Carper is hereby placed on probation for 2 years from this date. During this probationary period, he shall be subject to suspension for 6 months upon motion of the Counsel for Discipline if he subsequently violates the conditions of probation or any disciplinary rule. Any such suspension shall

be in addition to any further discipline under the Nebraska Supreme Court Rules of Discipline for any such subsequent violation.

(3) The conditions of probation are that, during the probationary period, Carper shall:

(a) Within the first 60 days of the probationary period, establish an office system that encompasses complete records of all funds and properties of a client coming into the possession of Carper;

(b) Within the first 60 days of the probationary period, establish an office system such that within 3 days of receipt of client funds, Carper will advise the client in writing of the receipt of the funds and, thereafter, within the first 10 days of each following month, render complete records of appropriate accounts to each of his clients regarding those accounts;

(c) Allow another attorney, chosen by Carper with the consent of the Counsel for Discipline, to examine Carper's trust account records and the contents of any contingency fee agreement with any client and to observe Carper when he places his signature on any such agreement, and Carper shall maintain a copy of such agreement and the related file for a period ending 2 years after the expiration of the probationary period or the expiration of any additional period of suspension imposed by this court pursuant to paragraph (2) above;

(d) Not make any oral or written amendment to a contingency fee agreement with any client without first receiving written approval from the attorney identified pursuant to paragraph (3)(c) above;

(e) Successfully complete a course in legal ethics at an accredited law school within the first 365 days of probation;

(f) Complete an accredited continuing legal education course in law office management during the probationary period;

(g) Pay all costs of the prosecution of this action and all costs and professional fees of the attorney identified to carry out the requirements of paragraphs (3)(c) and (d) above; and

(h) File a report with the Counsel for Discipline every 3 months advising the Counsel for Discipline as to Carper's fulfillment of the conditions of probation.

JUDGMENT OF DISCIPLINARY SANCTIONS.

WHITE, J., not participating.

ASHLAND STATE BANK, A NEBRASKA BANKING CORPORATION, APPELLEE AND CROSS-APPELLANT, V. ELKHORN RACQUETBALL, INC., A NEBRASKA CORPORATION, APPELLEE AND CROSS-APPELLEE, AND KENNETH OPSTEIN, APPELLANT AND CROSS-APPELLEE.

520 N.W.2d 189

Filed July 22, 1994. No. S-92-784.

1. **Judgments: Appeal and Error.** In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless they are clearly wrong.
2. _____: _____. In reviewing a judgment awarded in a bench trial, the appellate court does not reweigh the evidence but considers the judgment in a light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.
3. **Trial: Witnesses.** In a bench trial of a law action, the court, as the trier of fact, is the sole judge of the credibility of the witnesses and the weight to be given their testimony.
4. **Contracts: Intent.** The intent of the parties is determinative of whether a party is an accommodation maker or the principal obligor of an instrument.
5. **Trial: Appeal and Error.** An issue not presented to or passed on by the trial court is not appropriate for consideration on appeal.
6. **Pleadings: Appeal and Error.** An appellate court is obligated to dispose of cases on the basis of the theory presented by the pleadings on which the case was tried.
7. **Debtors and Creditors: Interest.** In the absence of a contract or statute, compensation in the form of compound interest is not allowed to be computed upon a debt.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

Patrick M. Flood and Edith T. Peebles, of Zweiback, Hotz & Lamberty, P.C., for appellant.

Dean J. Sitzmann, of Steier, Rogers & Pistillo, P.C., for appellee Ashland State Bank.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ.

WRIGHT, J.

Ashland State Bank (Bank) sued Elkhorn Racquetball, Inc. (Elkhorn), and Kenneth Opstein to recover on a promissory note. The district court for Douglas County entered judgment against Elkhorn and Opstein for the principal balance due plus

simple interest, a total of $138,261.94, plus costs. Opstein appeals; the Bank cross-appeals.

SCOPE OF REVIEW

In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless they are clearly wrong. *Gibb v. Strickland*, 245 Neb. 325, 513 N.W.2d 274 (1994).

FACTS

In 1977, Harry Farnham built a racquet club in Elkhorn, Nebraska. In 1982, Opstein purchased the racquet club from Farnham, giving him the promissory note in question as a part of the purchase price. Farnham testified that the note was drawn so that Opstein would be personally responsible for the obligation and so that Farnham would be able to look to Opstein personally for payment.

The racquet club was transferred to a limited partnership, 99 percent of which was owned by Opstein, for the beginning of the tax year 1983. Upon instructions from Opstein's accountant, Farnham formed a subchapter S corporation for the racquet club in 1987. Opstein carried the losses relating to the racquet club to offset income on his personal income tax returns.

The promissory note at issue indicates that it was part of a number of transactions. On December 20, 1982, Farnham made a notation on the note which extended the due date from November 15, 1983, to November 15, 1985. Farnham testified that he notified Opstein of the extension and that Opstein did not object.

In an entry dated December 21, 1982, the note recites: "In consideration of Seventy-two thousand & five hundred dollars, ($72,500) undersigned sells, assigns, & transfers the above note to Frank Bemis, with recourse. /s/ Harry J. Farnham." Farnham testified that he transferred the note to Bemis with notice to Opstein and that Opstein did not object.

Thereafter, Farnham repaid Bemis, and Bemis made a "paid in full" notation on the note and reassigned the note to Farnham. On the reverse side of the second page of the note is the entry: "In consideration of payment of $84,000.00

($75,000.00 principal and $9,000.00 interest) by Harry J. Farnham to undersigned as of 11/15/84, the above note is reassigned and transferred to Harry J. Farnham as of said date. /s/ Frank Bemis."

The next entry recites: "Harry J. Farnham acknowledges receipt from Elkhorn Racquet Club, Inc. of the sum of $9,000.00 in full payment of interest on above note for period of 11/15/82 to 11/15/83. /s/ Harry J. Farnham."

Farnham then made this notation on March 1, 1984:

> For and in consideration of the sum of Seventy-five Thousand Dollars ($75,000.00) received from Ashland State Bank, Ashland, Nebraska, the undersigned, Harry J. Farnham, hereby assigns with recourse this note and all proceeds hereunder to the Ashland State Bank, as collateral security for a Promissory Note in like amount dated March 1, 1984. /s/ Harry J. Farnham.

The Bank had loaned Farnham $75,000, taking the note as collateral. Farnham testified that at the time he assigned the note to the Bank, the note was not overdue and had not been dishonored, he was not aware of any defenses by any person, and he had not informed anyone at the Bank of any alleged setoffs or defenses. At the time of the assignment to the Bank, Farnham had other loans with the Bank which were current.

Farnham later defaulted on his loan obligations to the Bank and filed bankruptcy. The Bank initiated a replevin action against Elkhorn. Opstein then personally executed a "Stipulation for Payment," which was filed with the trial court on August 28, 1989, and thereafter, he personally made two payments of $2,500 to the Bank.

The stipulation was approved by Opstein as to form and content and provided for full payment of the note either at a date certain or when a judgment which was the subject of an appeal pending before this court was affirmed. In its petition, the Bank contended that the action pending before the Supreme Court was "sustained" November 9, 1989, and that the note became immediately due and payable. The Bank demanded payment, but Opstein and Elkhorn refused, and suit was commenced against Opstein and Elkhorn on March 2, 1990.

The Bank alleged that on November 15, 1982, Elkhorn,

Opstein, and Farnham executed and delivered to Farnham, in his individual capacity, a promissory note in the amount of $75,000 with interest accruing at 12 percent per annum. The Bank alleged that on March 1, 1984, Farnham assigned to the Bank all his rights in the promissory note, including all rights in the personal property described in the security interest, and that the Bank remained the holder and owner of the note in question.

Opstein asserted various defenses to the action, inter alia, that the Bank was not the owner of the note, that Farnham did not have an interest in the note which he could assign, and that Opstein had been discharged from liability on the note. Further, Opstein alleged that the Bank was not a holder in due course, that Elkhorn was not indebted to Farnham, that the note was fraudulently obtained by a fiduciary and was unenforceable, and that Opstein was entitled to a setoff against the Bank in excess of $1 million.

The trial court found that Opstein was a principal obligor or maker on the note and that the Bank took the note as a holder in due course and was entitled to a judgment against Elkhorn and Opstein for the principal balance due plus simple interest as provided in the note.

ASSIGNMENTS OF ERROR

Opstein assigns as error the trial court's finding that he was a principal obligor or maker on the note and that the Bank was a holder in due course. He alleges that the court erred in failing to allow the Bank's claim to be offset by sums Opstein asserts were owed to him by Farnham and in failing to find that Opstein was discharged from liability on the note. The Bank cross-appeals, claiming that the court erred in holding that the interest on the note was simple interest.

ANALYSIS

In our review of a bench trial in a law action, the trial court's factual findings have the effect of a jury verdict and will not be set aside on appeal unless they are clearly wrong. *Gibb v. Strickland*, 245 Neb. 325, 513 N.W.2d 274 (1994). In reviewing a judgment awarded in a bench trial, the appellate court does not reweigh the evidence but considers the judgment in a light

most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. *Florist Supply of Omaha v. Prochaska*, 244 Neb. 776, 509 N.W.2d 209 (1993).

Since Opstein claims that the trial court erred in finding that the Bank was a holder in due course, we examine the Bank's status in that regard. We first note that the applicable law, the Uniform Commercial Code (U.C.C.), has been amended and recodified since the issuance of the note. Changes in the law became effective in 1991 and 1992. The action here was commenced in March 1990. We have held that statutes covering substantive matters in effect at the time of the transaction govern, not later enacted statutes. *Norwest Bank Neb. v. Bowers, ante* p. 83, 516 N.W.2d 623 (1994); *Schall v. Anderson's Implement*, 240 Neb. 658, 484 N.W.2d 86 (1992). Therefore, the U.C.C. provisions appearing in the 1980 reissue apply in this case.

Neb. U.C.C. § 3-302(1) (Reissue 1980) provided: "A holder in due course is a holder who takes the instrument (a) for value; and (b) in good faith; and (c) without notice that it is overdue or has been dishonored or of any defense against or claim to it on the part of any person." Accord *John Deere Co. v. Boelus State Bank*, 233 Neb. 818, 448 N.W.2d 163 (1989). A holder is a person who is in possession of an instrument drawn, issued, or endorsed to him, to his order, to bearer, or in blank. Neb. U.C.C. § 1-201(20) (Reissue 1980).

It was not disputed at trial or on appeal that the Bank was in possession of the note or that the note was a negotiable instrument. In the stipulation referred to above, the Bank, Opstein, and Elkhorn stipulated that the Bank was the holder of a negotiable instrument (the promissory note dated November 15, 1982) and that Opstein's signature appeared on the note.

Patricia Adams, vice president of the Bank, testified that the Bank loaned Farnham $75,000 and took the note as collateral for the loan. Thus, the evidence established that the note was given for value. Also, no evidence in the record indicates that the Bank failed to act in good faith (which § 1-201(19) defined

as honesty in fact in the conduct or transaction concerned).

We next consider whether the Bank took the note without notice that it was overdue or had been dishonored, or without notice of any defense or claim on it on the part of any person. Opstein asserts that the Bank had notice of a claim or defense because the note had been extended and transferred multiple times on its face and because a nonparty to the note had written "paid in full" on its face.

The purchaser has notice of a claim or defense if (1) the instrument is so incomplete, bears such visible evidence of forgery or alteration, or is otherwise so irregular as to call into question its validity, terms, or ownership or to create an ambiguity as to the party to pay; or (2) the purchaser has notice that the obligation of any party is voidable in whole or in part or that all parties have been discharged. Neb. U.C.C. § 3-304(1) (Reissue 1980).

As we examine the record and the note in question, we find that although the note had been transferred and assigned several times and contained a "paid in full" notation, the note also contained satisfactory explanations of the transactions and showed that the note had been reassigned and transferred to Farnham before Farnham assigned the note to the Bank. There was no evidence that the note had been paid by the obligors on the note.

We do not accept Opstein's argument that the note was overdue because Opstein did not agree to extend the maturity date via his signature on the note. Although Opstein testified that he was never asked for his consent to an extension of the maturity date, Farnham testified that he notified Opstein of every one of the transactions set forth on the note and that Opstein did not object to any of them. In a bench trial of a law action, the court, as the trier of fact, is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Moore v. State*, 245 Neb. 735, 515 N.W.2d 423 (1994). The court heard the testimony of Farnham and Opstein and found that the Bank was a holder in due course. We cannot say that the court was clearly wrong.

Opstein argues that it was the Bank's burden to prove it did not have notice of a claim or defense. We disagree. A signature

on a promissory note is presumed genuine unless specifically denied in the pleadings. Neb. U.C.C. § 3-307(1) (Reissue 1980). When signatures are admitted or established, production of the instrument entitles a holder to recover on it unless the defendant establishes a defense. § 3-307(2). Opstein stipulated that his signature appeared on the note. Thus, Opstein had the burden of proof to establish a defense to the promissory note.

The defense asserted by Opstein was that he did not consent to the extension of the maturity date on the note. Farnham testified that every transaction was carried out with Opstein's knowledge and consent. In this case, we do not reweigh the evidence, but consider the judgment in a light most favorable to the successful party and resolve the evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. See *Florist Supply of Omaha v. Prochaska*, 244 Neb. 776, 509 N.W.2d 209 (1993). Opstein has not proven that the Bank had notice of his claim or defense.

As a part of his argument that the Bank was not a holder in due course, Opstein contends that the Bank had notice of a claim against the note because Farnham had signed the note as a fiduciary of Elkhorn when the Bank knew that Farnham was transacting business for his own benefit. Section 3-304(2) provided: "The purchaser has notice of a claim against the instrument when he has knowledge that a fiduciary has negotiated the instrument in payment of or as security for his own debt or in any transaction for his own benefit or otherwise in breach of duty."

Opstein argues that the Bank had notice because Farnham was president of Elkhorn and had pledged the note as collateral for a personal loan. The record does not support Opstein's argument. Farnham testified that he must have notified someone at the Bank of the purpose of the loan. He could think of many reasons for needing the loan, including the monthly payments for the racquet club. Farnham was asked the following question: "Would you have told Lee Sapp that at Ashland State Bank; that's why you needed the loan?" Farnham replied, "I don't know. I could have. As I said, I could have given them a hundred reasons and they would all be

true so I — I have no specific recollection — I'm sure the bank does — as to what I needed the money for." Opstein did not call Sapp to testify as to his recollection of the purpose of the loan. There was no other evidence to establish the purpose of the loan. Therefore, the record does not support Opstein's claim that the Bank knew that Farnham was seeking a loan for personal reasons. The Bank is entitled in this case to every reasonable inference deducible from the evidence. See *Florist Supply of Omaha, supra.*

Knowledge of the fact that any person negotiating an instrument is or was a fiduciary does not of itself give the purchaser notice of a claim or defense. § 3-304(4)(e). The mere existence of a fiduciary relation is not enough to prevent the holder from taking in due course, and such holder is free to take the instrument on the assumption that the fiduciary is acting properly. There is no evidence the Bank had notice that Farnham was breaching any fiduciary duty when he negotiated the note to the Bank. The note was given to Farnham when Opstein purchased Farnham's interest in the racquet club.

Opstein contends that the Bank was on notice that the note was overdue when the Bank made additional loans using the note as collateral. The record shows that at the time the note was assigned to the Bank on March 1, 1984, the note's due date had been extended to November 15, 1985. The note was not overdue when the Bank accepted it, and we find that this argument is without merit. The evidence established the Bank was a holder in due course, and the Bank therefore took the note free from all claims asserted by Opstein. See Neb. U.C.C. § 3-305 (Reissue 1980).

Opstein next claims that the trial court erred in finding that he was a principal obligor or maker on the note. He asserts that he was merely an endorser because the signature is ambiguous and because the note itself refers only to Elkhorn.

The intent of the parties is determinative of whether a party is an accommodation maker or the principal obligor of an instrument. *Marvin E. Jewell & Co. v. Thomas*, 231 Neb. 1, 434 N.W.2d 532 (1989). Farnham testified that it was his intent that Opstein be obligated personally as well as in his capacity as vice president of Elkhorn. Opstein's tax returns indicate he carried

the obligation as a deduction on his personal income tax returns, and he personally made payments on the note on two separate occasions.

On the basis of the evidence presented at trial, we find that Opstein was a principal obligor on the note and that the trial court correctly so determined. Opstein benefited from his signature on the note by receipt of the ownership of the racquet club, and he used the obligation on the note as a deduction on his personal income tax returns. Opstein's testimony failed to contradict the evidence that he was a principal obligor on the note.

Opstein next contends that his signature served as an accommodation because Farnham needed Opstein's signature to negotiate the note and because it was Farnham who received the cash after the note was assigned. Having decided that the Bank was a holder in due course, we determine that Opstein's claim that his signature served as an accommodation is not a defense to the Bank's action on the note. See § 3-305. We also point out that Opstein did not raise this defense at trial, and therefore, Opstein has waived his right to argue such issue on appeal. An issue not presented to or passed on by the trial court is not appropriate for consideration on appeal. *How v. Mars*, 245 Neb. 420, 513 N.W.2d 511 (1994). This court is obligated to dispose of cases on the basis of the theory presented by the pleadings on which the case was tried. *Central States Resources v. First Nat. Bank*, 243 Neb. 538, 501 N.W.2d 271 (1993).

Opstein's argument that the trial court erred in failing to offset the Bank's claim against any sums owed by Farnham to Opstein relies upon the assertion that the Bank was not a holder in due course. Having found that the trial court correctly decided the Bank was a holder in due course, we find that the Bank took the note free and clear of these claims and defenses. See § 3-305.

Finally, Opstein argues that as an accommodation party, he is a surety under the U.C.C. and is entitled to assert the special suretyship defenses set forth in Neb. U.C.C. § 3-606 (Reissue 1980). First, we have found that Opstein was a principal obligor on the note and not an accommodation party, and second, this defense is not available against a holder in due course. See

§ 3-305. This argument has no merit.

We find that the reasonable inferences deducible from the evidence support the trial court's findings that Opstein was a principal obligor or maker on the note and that the Bank took the note as a holder in due course and was entitled to judgment against Elkhorn and Opstein on the note.

We next address the cross-appeal that the trial court erred in finding that interest on the note was simple interest rather than compound interest. "The general rule is that in the absence of contract or statute, compensation in the form of compound interest is not allowed to be computed upon a debt." *Abbott v. Abbott*, 188 Neb. 61, 68, 195 N.W.2d 204, 209 (1972). Accord *Cherokee Nation v. United States*, 270 U.S. 476, 46 S. Ct. 428, 70 L. Ed. 694 (1926). The Bank argues that because the parties treated the note as bearing interest on a compound basis, Opstein should be estopped from arguing to the contrary. We disagree. There was no evidence presented of a contract, and there is no statute which allows compound interest on the note in this case. The trial court was correct in ordering the award of simple interest.

The judgment of the trial court is hereby affirmed in all respects.

AFFIRMED.

MIKE ANDERSON, APPELLANT, V. NASHUA CORPORATION, DEFENDANT AND THIRD-PARTY PLAINTIFF, LIBERTY MUTUAL INSURANCE COMPANY, DEFENDANT, AND W.S. BUNCH CO., A CORPORATION, ET AL., THIRD-PARTY DEFENDANTS, APPELLEES.

519 N.W.2d 275

Filed July 22, 1994. No. S-92-802.

1. **Summary Judgment: Appeal and Error.** In an appellate review of a summary judgment, the appellate court reviews the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.

2. **Summary Judgment.** Summary judgment is proper when the pleadings, depositions, stipulations, and affidavits in the record disclose that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.
3. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below.
4. **Negligence: Strict Liability: Proximate Cause: Words and Phrases.** As a term of art, "abnormally dangerous" is considered interchangeable with "ultrahazardous" to define an activity that, when conducted, proximately causes harm to another, for which a possessor of land is held strictly liable.
5. **Statutes: Legislature: Intent: Appeal and Error.** In settling upon the meaning of a statute, an appellate court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense, it being the court's duty to discover, if possible, the Legislature's intent from the language of the statute itself.
6. **Statutes: Legislature: Intent.** The components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible.
7. **Statutes.** If there is a conflict between two statutes on the same subject matter, the special provisions of a statute prevail over the general provisions in the same or other statutes.
8. **Statutes: Legislature: Intent: Employer and Employee.** The Legislature intended to limit the application of Neb. Rev. Stat. §§ 48-403 and 48-422 (Reissue 1988) to the employer-employee relationship.
9. **Statutes: Words and Phrases.** The "aforesaid places" referred to in Neb. Rev. Stat. § 48-403 (Reissue 1988) are those which are mentioned in Neb. Rev. Stat. §§ 48-401 and 48-402 (Reissue 1988): factories, mills, or workshops; mercantile or mechanical establishments; or other buildings where one or more persons are employed.
10. **Negligence.** For actionable negligence to exist, there must be a legal duty on the part of the defendant to protect the plaintiff from injury, a failure to discharge that duty, and damage proximately resulting from the undischarged duty.
11. _____. "Duty" is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff; and in negligence cases, the duty is always the same—to conform to the legal standard of reasonable conduct in the light of the apparent risk.
12. **Negligence: Words and Phrases.** A duty, in negligence cases, may be defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.
13. **Negligence.** The question of whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation.
14. **Negligence: Contractors and Subcontractors.** In the landowner-independent

contractor context, a landowner's duty to maintain the premises in a reasonably safe condition is limited to latent defects that the independent contractor or his employees do not have knowledge of.

15. _____: _____. There is a duty of due care imposed on an employer of an independent contractor when the independent contractor's work involves special risks or dangers, including work that is dangerous in the absence of special precautions.
16. **Negligence: Liability: Contractors and Subcontractors.** If a general contractor hires an independent contractor to perform work which the general contractor "should recognize as likely to create during its progress a peculiar risk of physical harm to others unless special precautions are taken," the general contractor may be liable for physical harm caused to employees of the subcontractor if the general contractor fails to exercise reasonable care to take such precautions, even though the general contractor has provided, in the contract or otherwise, that the subcontractor be responsible for such precautions.
17. **Negligence: Words and Phrases.** A "peculiar risk" is one which involves some special hazard resulting from the nature of the work done, which calls for some special precaution.
18. **Negligence: Liability: Contractors and Subcontractors.** Generally, the employer of an independent contractor is not liable for physical harm caused to another by the acts or omissions of the contractor or his servants.
19. _____: _____: _____. The employer of an independent contractor may be vicariously liable to a third party (1) if the employer retains control over the contractor's work or (2) if, by rule of law or statute, the employer has a nondelegable duty to protect another from harm caused by the contractor.
20. **Negligence: Contractors and Subcontractors: Workers' Compensation.** A landowner employer's nondelegable duty to maintain the premises in a safe condition does not extend to employees of an independent contractor or agent who are injured due to the failure of the independent contractor or agent to make those repairs and who, as a result, receive workers' compensation benefits.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Reversed and remanded for further proceedings.

James E. Harris and Timothy K. Kelso, of Harris, Feldman, Stumpf Law Offices, for appellant.

Jay L. Welch, of Rickerson, Welch, Wulff & Childers, and J. Patrick Green for appellee Nashua Corp.

David D. Ernst and Lisa M. Meyer, of Gaines, Mullen, Pansing & Hogan, for appellee W.S. Bunch Co.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ.

LANPHIER, J.

This is an appeal by the plaintiff, Mike Anderson, of an order of the Douglas County District Court granting summary judgment on behalf of the defendant Nashua Corporation (Nashua). Nashua had hired Anderson's employer, W.S. Bunch Co. (Bunch), to paint the interior of several underground storage tanks on Nashua's property. Anderson was severely burned when the underground storage tank he was painting burst into flames while he was inside it. Anderson, having received workers' compensation benefits through Bunch, brought this action, predicated on strict liability and negligence, against Nashua. The issues presented concern the liability of an owner of property to an employee of an independent contractor. Nashua filed a third-party petition against Bunch and its president and vice president. Anderson then filed a motion for partial summary judgment, and Nashua filed a motion for summary judgment. The district court for Douglas County sustained Nashua's motion for summary judgment, held the third-party action was moot, and dismissed Anderson's action. On appeal, Anderson argues that Nashua should have been held strictly liable for conducting an ultrahazardous activity. Anderson also argues that Nashua should have been held strictly liable for violating health and safety regulations, specifically Neb. Rev. Stat. §§ 48-403 and 48-422 (Reissue 1988). With respect to his allegations of negligence, Anderson argues that the trial court should have held Nashua directly liable for its own negligence in failing to see that proper safety precautions were taken and vicariously liable for the negligence of its independent contractor, Bunch. We hold pursuant to *Plock v. Crossroads Joint Venture*, 239 Neb. 211, 475 N.W.2d 105 (1991), that Nashua could not be held vicariously liable for Bunch's negligence, since Bunch is immune from suit pursuant to the exclusivity provision of the workers' compensation laws. However, genuine issues of material fact exist with regard to whether Nashua was directly negligent. We therefore reverse that part of the district court's

holding and remand the cause for further proceedings consistent with this opinion.

BACKGROUND

The defendant and third-party plaintiff, Nashua, owns and operates a manufacturing plant in Omaha, Nebraska. Nashua hired Bunch, a third-party defendant, to paint the interior of three underground storage tanks located outside the plant. Two of Bunch's employees, Anderson and Eddie Donner, were assigned to do the work.

On December 21, 1986, Anderson and Donner began to paint the first of the three tanks with an epoxy paint. The paint, as it cured, put off flammable vapors. The tank was 8 or 9 feet in diameter and "15 or 20 feet long." There was a single round entrance, approximately 18 inches in diameter, located in the middle of the top of the tank. A single non-explosive-proof light bulb was hanging over this entrance. Donner mixed the paint outside the tank. Anderson used a spray gun to apply paint to the inside of the tank. The first coat was applied without incident and dried overnight. The next day, when Anderson was almost finished with the second application, he started to signal Donner to send a ladder down for him. As he did so, he looked up at the manhole and noticed that the glove on his left hand had caught fire. The flames quickly spread over the rest of Anderson's body, and soon the tank was full of flames. Donner initially covered the manhole in an effort to snuff out the flames, but later pulled Anderson from the tank.

Anderson received benefits from Bunch's workers' compensation insurance carrier, the defendant Liberty Mutual Insurance Company.

ASSIGNMENTS OF ERROR

Anderson's assignments of error, as restated, are that the trial court erred (1) in failing to hold Nashua strictly liable, having found that the work being performed was abnormally dangerous; (2) in determining that Anderson was not one to whom Nashua owed a nondelegable duty; (3) in determining that certain health and safety regulations, §§ 48-403 and 48-422, did not apply to Nashua; and (4) in applying *Plock, supra*, to the case at hand.

STANDARD OF REVIEW

In an appellate review of a summary judgment, the appellate court reviews the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Horvath v. M.S.P. Resources, Inc., ante* p. 67, 517 N.W.2d 89 (1994). Summary judgment is proper when the pleadings, depositions, stipulations, and affidavits in the record disclose that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Id.*

Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determination made by the court below. *In re Application of City of Lincoln*, 243 Neb. 458, 500 N.W.2d 183 (1993).

STRICT LIABILITY

In two of his assignments of error, Anderson alleges that the trial court erred in not holding Nashua strictly liable for the injuries he sustained.

COMMON LAW LIABILITY

Anderson first argues that since the trial court found that the work contracted for created an abnormally dangerous situation and since there is "no question that the activity was a direct and proximate cause of Plaintiff's injuries," the trial court should have held Nashua strictly liable. Brief for appellant at 21. We disagree.

It is true that the trial court, in its order granting Nashua's summary judgment, stated that "[t]he evidence shows that the work contracted for and undertaken creates an inherently or *abnormally dangerous situation*." (Emphasis supplied.) However, we do not believe the trial court used the phrase "abnormally dangerous" in the sense in which Anderson asserts it was used. Anderson asserts the trial court used "abnormally dangerous" as a term of art. As a term of art, "abnormally dangerous" is considered interchangeable with "ultrahazardous" to define an activity that, when conducted, proximately causes harm to another, for which a possessor of

land is held strictly liable. W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 78 at 555-56 (5th ed. 1984). Despite Anderson's assertion to the contrary, it is apparent from reading the trial court's order that the phrase "abnormally dangerous" was used as a synonym for "inherently dangerous," a different term of art. Nowhere in the order was the phrase "abnormally dangerous" used alone; it was always immediately preceded by the words "inherently or," so as to read "inherently or abnormally dangerous." Throughout the order, the trial court used the phrase only in the context of the nondelegable duty exception to the general rule that the employer of an independent contractor is not liable for the negligence of the independent contractor.

If we assume, as Anderson asserts, notwithstanding the foregoing, that the trial court used the phrase "abnormally dangerous" to mean ultrahazardous as that term is commonly used in the context of strict liability, we would not hold Nashua strictly liable for the injuries Anderson sustained while painting the underground tank.

Anderson has cited no authority to support the imposition of strict liability in this case. He merely relies upon NJI2d Civ. 8.41 comment at 540, which is the "Burden of Proof part of the Statement of the Case instruction for damages allegedly caused by ultrahazardous activities . . . ." Apparently, Anderson considers the instruction to be evidence of the law of Nebraska. To the contrary, the instructions contained in the second edition of the Nebraska Jury Instructions are designed to be used when they reflect the law and the pleadings and evidence call for such an instruction. Neb. Ct. R. Regarding Nebraska Jury Instructions.

The first issue we must address is whether Nebraska has adopted the doctrine of strict liability for ultrahazardous (or abnormally dangerous) activities. It is clear that the issue has never been expressly addressed by this court. In *Wendt v. Yant Construction Co.*, 125 Neb. 277, 280, 249 N.W. 599, 600 (1933), this court stated that "one who uses dynamite in blasting, so as to cause likelihood of risk to property, is liable, if damage to the property results, whether from direct impact of rock thrown out by the explosion or from concussion."

However, that case was tried to the jury on a negligence theory. In affirming the jury's verdict, this court stated the following: "The jury had testimony to warrant their verdict on the question of negligence. Certainly the appellants cannot complain that appellee was required to show more than the rule of law as to liability in this case." *Id.* at 280-81, 249 N.W. at 601.

In *Krance v. Faeh*, 215 Neb. 242, 338 N.W.2d 55 (1983), a strict liability instruction was given to the jury at trial. In that case, we held that the giving of the strict liability instruction was erroneous because the doctrine of strict liability was inapplicable given the relationship between the parties, which was that of lessor-lessee.

Most recently, in *Fitzpatrick v. U S West, Inc., ante* p. 225, 518 N.W.2d 107 (1994), we declined to impose the doctrine of strict liability on an employer of a public utility which had been hired to reconnect electrical power to a building.

In light of these cases, it appears that the doctrine of strict liability for ultrahazardous activities has not been adopted in Nebraska, but neither has it been repudiated. In any event, we decline in this case to rule on the applicability of the doctrine of strict liability for ultrahazardous activities. There is an insufficient basis for concluding that the activity undertaken is ultrahazardous.

STATUTORY LIABILITY

Anderson also sought to hold Nashua strictly liable on a statutory basis for the injuries he sustained. Anderson alleges that Nashua violated § 48-403 and is therefore liable for damages to Anderson pursuant to § 48-422.

Section 48-403 states the following:

> If in any of the aforesaid places any process is carried on by which dust or fumes are caused, which may be inhaled by the persons employed therein, or if the air shall become exhausted or impure, there shall be provided a fan or other such mechanical device as will substantially carry away all such dust or fumes or other impurities, subject to the approval of the Department of Labor.

Section 48-422 states:

> Every person operating a plant where machinery is used

> who shall violate any of the provisions of sections 48-401 to 48-424 shall be liable in damages to any person injured, as a result thereof, or to the heirs of any person who shall have died as a result thereof.

The trial court held that these health and safety regulations were inapplicable in the case at hand for two reasons: First, because the statutes do not apply to the employer-subcontractor relationship. Second, because a storage tank set apart from the plant is not the type of place in which the statutes require that the given precautions be taken. Anderson disagrees with the trial court's interpretation of the statutes.

In settling upon the meaning of a statute, we must determine and give effect to the purpose and intent of the Legislature *as ascertained from the entire language of the statute* considered in its plain, ordinary, and popular sense, it being our duty to discover, if possible, the Legislature's intent from the language of the statute itself. *In re Application of City of Lincoln*, 243 Neb. 458, 500 N.W.2d 183 (1993). Further, the components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible. *Id.* Finally, if there is a conflict, the special provisions of a statute prevail over the general provisions in the same or other statutes. *Id.*

Anderson bases his argument partially on language found in § 48-403 and partially on language found in § 48-422. From § 48-403, he relies on the phrase "aforesaid places," which apparently refers to the places listed in Neb. Rev. Stat. §§ 48-401 and 48-402 (Reissue 1988): every factory, mill, or workshop; mercantile or mechanical establishment; or other building where one or more persons are employed. From § 48-422, Anderson relies on the phrase "any person" to show that the statutes were intended to apply to him.

Although it is true that Nashua does operate a factory and that Anderson is "any person," those facts alone do not mean the health and safety regulations are applicable here. At issue is, To whom and under what circumstances do the health and safety regulations apply?

First, regarding to whom the regulations apply, we find instructive the case of *Quist v. Duda*, 159 Neb. 393, 67 N.W.2d 481 (1954). In *Quist*, this court was confronted with the issue of whether one of the health and safety regulations applied to a landlord who owned an office building-parking garage. Our holding, that the regulations did not apply to the landlord, was not based upon any express statement, but upon the words used in the act. The words "employer" and "employee" were used throughout the act. From this language, we determined that the Legislature intended that the act's application be limited to the relationship of employer and employee. Although we were not specifically concerned with §§ 48-403 and 48-422 in *Quist*, those sections were a part of chapter 48, article 4, as was the section we were concerned with. Neither of those sections has been amended since *Quist* was decided. Although in these specific sections there are not as many references to the employer-employee relationship, we are convinced that the Legislature intended to limit the application of these sections to the employer-employee relationship. Thus, since that relationship does not exist between Nashua and Anderson, §§ 48-403 and 48-422 are not applicable here.

With regard to whether an underground tank apart from a factory is within the purview of the health and safety regulations, we again look to the plain language of the statutes. Section 48-403 refers to "aforesaid places." There are no places mentioned in § 48-403, and there is no definitional section of the act defining that phrase. However, §§ 48-401 and 48-402, which immediately precede § 48-403, refer to factories, mills, or workshops; mercantile or mechanical establishments; or other buildings where one or more persons are employed. It is clear that these are the "aforesaid places" referred to in § 48-403. These being the "aforesaid places," the trial court's determination was correct that Nashua did not violate the statutes by failing to ventilate the underground storage tank, located away from the building where the manufacturing takes place.

NEGLIGENCE

Anderson's remaining assignments of error are interrelated

and will be addressed together. They combine to assert that the trial court erred in determining that as a matter of law, Nashua could not be held directly or vicariously liable for Anderson's injuries.

The trial court held that there was no pleading or evidence presented of any direct negligence on the part of Nashua which created a duty to Anderson. The trial court also found that although Nashua owed third parties a nondelegable duty to protect them from harm resulting from the inherently dangerous work, Nashua could not be held vicariously liable for Bunch's negligence. The trial court, applying *Plock v. Crossroads Joint Venture*, 239 Neb. 211, 475 N.W.2d 105 (1991), concluded that since Nashua's agent, Bunch, was immune from suit by virtue of the exclusivity of workers' compensation, so was the principal, Nashua.

Thus, the core issue of this appeal is whether, given the facts as contained in the pleadings, depositions, admissions, stipulations, and affidavits contained in the record, Nashua owed a duty to Anderson.

It is fundamental that for actionable negligence to exist, there must be a legal duty on the part of the defendant to protect the plaintiff from injury, a failure to discharge that duty, and damage proximately resulting from the undischarged duty. *Fitzpatrick v. U S West, Inc.*, *ante* p. 225, 518 N.W.2d 107 (1994); *Schmidt v. Omaha Pub. Power Dist.*, 245 Neb. 776, 515 N.W.2d 756 (1994).

> " ' "Duty" is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff; and in negligence cases, the duty is always the same—to conform to the legal standard of reasonable conduct in the light of the apparent risk. . . .
>
> " 'A duty, in negligence cases, may be defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.' "

Fitzpatrick, ante at 232, 518 N.W.2d at 113. Accord *Schmidt, supra*.

The question of whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a

particular situation. *Fitzpatrick, supra*; *Schmidt, supra*.

Anderson argues that he has pled and presented facts to demonstrate that Nashua owed him duties of care, for the breach of which Nashua may be held liable. Anderson further argues that Nashua breached some of the duties directly and that Bunch breached some of the duties. With regard to the duties allegedly breached by Bunch, Anderson claims the duties were nondelegable and that Nashua would be vicariously liable. The allegations of Nashua's vicarious liability for Bunch's negligence and for Nashua's own direct negligence will be discussed in separate sections of this opinion.

DIRECT NEGLIGENCE

First, we will address the duties allegedly breached directly by Nashua. In this respect, the trial court addressed only one duty, the duty to keep premises safe for business invitees. The trial court, citing *Plock*, noted that the duty to keep premises safe for business invitees has been modified in the landowner-independent contractor context. In that context, the landowner's duty to maintain the premises in a reasonably safe condition is limited to latent defects that the independent contractor or his employees do not have knowledge of. *Plock, supra*. The trial court found that the buildup of dangerous fumes was not a latent defect, but one which arose out of the work performed by the subcontractor. Thus, the trial court held that Nashua had no duty to protect Anderson from the harm resulting from the hazard. In this respect, the trial court's holding was proper. However, the facts Anderson pled and presented establish that Nashua had an additional duty.

There is a duty of due care imposed on an employer of an independent contractor when the independent contractor's work involves special risks or dangers, including work that is dangerous in the absence of special precautions. *Parrish v. Omaha Pub. Power Dist.*, 242 Neb. 783, 496 N.W.2d 902 (1993). In *Parrish*, we outlined the duty as follows:

> As expressed in Restatement (Second) of Torts § 416 (1965), if a general contractor hires an independent contractor to perform work which the general contractor "should recognize as likely to create during its progress a

> peculiar risk of physical harm to others unless special precautions are taken," the general contractor may be liable for physical harm caused to employees of the subcontractor if the general contractor fails to exercise reasonable care to take such precautions, even though the general contractor has provided, in the contract or otherwise, that the subcontractor be responsible for such precautions.

Id. at 799-800, 496 N.W.2d at 913.

In *Parrish*, a " 'peculiar risk' " was defined as one which involves some special hazard resulting from the nature of the work done, which calls for some special precaution. *Id.* at 800, 496 N.W.2d at 913. Without question, the task to be completed by Bunch involved a "peculiar risk." Consequently, Nashua was required to exercise reasonable care to ensure that Bunch utilized proper safety precautions.

There was evidence adduced at the summary judgment hearing to the effect that the risk of a fire could have been significantly reduced. There was testimony from Bunch employees and experts to the effect that the use of an explosion-proof lamp, a ventilation fan, and an air monitor could have made performance of the work safe. Moreover, the contract between Nashua and Bunch illustrates that Nashua retained a substantial amount of control over the project. The contract contained "boilerplate" language on the reverse side relating to the owner's retaining control of the project. The contract, along with other provisions relating to control, contained the following clause:

> RESERVATION OF RIGHTS: Buyer [Nashua] reserves the right to make changes in, or defer shipment of, this order or any part thereof, or to terminate all or any part of this order at any time, if Buyer's production plans change, are delayed or curtailed, or any contingencies interfere with the receipt, handling or stocking of the goods, or performance of the services, ordered herein. Buyer shall not be liable for any cost or expense incurred by Seller [Bunch], in connection with this order, after date of Seller's receipt of any such change or termination notice.

It is clear from this clause that Nashua retained enough control to implement whatever safety precautions it deemed necessary. Although a provision of the contract required Bunch to comply with the Occupational Safety and Health Act of 1970, among other laws, that provision would not serve to diminish the responsibility that accompanied Nashua's retained control. Thus, we conclude that there was sufficient evidence to present a genuine issue of material fact concerning Nashua's duty to protect Anderson from harm, and whether Nashua breached that duty by failing to exercise due care to protect Anderson from the hazard that resulted.

VICARIOUS LIABILITY

The trial court determined as a matter of law that the work being conducted was inherently dangerous. As we stated above, the trial court then correctly decided that in light of the inherently dangerous work, Nashua had a nondelegable duty to protect third parties from harm resulting from negligently performed work. However, relying upon *Plock v. Crossroads Joint Venture*, 239 Neb. 211, 475 N.W.2d 105 (1991), the trial court concluded that Anderson, as an employee of the independent contractor employed by Nashua, was not one to whom Nashua could be held vicariously liable. Anderson argues that the trial court erred in applying *Plock* to the case at hand, since here different nondelegable duties are involved.

Generally, the employer of an independent contractor is not liable for physical harm caused to another by the acts or omissions of the contractor or his servants. *Fitzpatrick v. U S West, Inc., ante* p. 225, 518 N.W.2d 107 (1994); *Parrish v. Omaha Pub. Power Dist.*, 242 Neb. 783, 496 N.W.2d 902 (1993). There are two recognized exceptions to the general rule. The employer of an independent contractor may be vicariously liable to a third party (1) if the employer retains control over the contractor's work or (2) if, by rule of law or statute, the employer has a nondelegable duty to protect another from harm caused by the contractor. *Fitzpatrick, supra*; *Parrish, supra*. However, notwithstanding these exceptions, we have held:

> [T]he landowner employer's nondelegable duty to

> maintain the premises in a safe condition does not extend to employees of an independent contractor or agent who are injured due to the failure of the independent contractor or agent to make those repairs and who, as a result, receive workers' compensation benefits.

Plock, 239 Neb. at 230-31, 475 N.W.2d at 118.

In *Plock*, the defendant, Crossroads Joint Venture (CJV), was the owner of the Crossroads Shopping Center in Omaha. CJV entered into a management agreement with MS Management Associates, Inc. (MSM), whereby MSM assumed responsibility for the management, control, and maintenance of the shopping center. Plock, the plaintiff, was an employee of MSM. He was injured when he stepped out of the sweeper truck he had been operating into an uncovered drain hole. The case was tried to a jury, which returned a verdict in favor of Plock. CJV appealed from the verdict and asserted that the trial court erred in failing to hold that CJV was immune from suit. CJV contended that it was immune because its agent, MSM, was liable to Plock only for workers' compensation benefits and that therefore CJV was immune from other common-law tort liability; and as the only liability of CJV was that imputed to it by its agent, and the agent being immune, CJV as the principal was also immune. We determined that CJV was immune. Consequently, we reversed the jury verdict and remanded the cause to the district court to enter judgment for the defendant.

Contrary to Anderson's assertion, our holding in *Plock* was not based on the nature of the nondelegable duty involved, but, rather, on the notion that in the context of vicarious liability, a principal cannot be liable where the agent is immune. Since Bunch, by virtue of the exclusivity provision of the workers' compensation laws, is immune from suit, Nashua, its employer-principal, necessarily cannot be held vicariously liable. In this respect, the trial court was correct, and this part of the judgment is affirmed.

CONCLUSION

The district court's use of the term "abnormally dangerous" in its order was confusing. Despite the use of that term, we refuse to hold Nashua strictly liable for the harm arising out of

the performance of work conducted herein. The district court's determination that the health and safety regulations were not applicable to Nashua in the case at hand was correct. Also, the district court's application of *Plock v. Crossroads Joint Venture*, 239 Neb. 211, 475 N.W.2d 105 (1991), was appropriate under the circumstances of this case. However, the district court's grant of summary judgment was improper given the genuine issues of material fact surrounding the allegations of Nashua's direct negligence. Therefore, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

DIANE L. WELCH, APPELLEE AND CROSS-APPELLANT, V. RICHARD A. WELCH, JR., APPELLANT AND CROSS-APPELLEE.

519 N.W.2d 262

Filed July 22, 1994. No. S-92-883.

1. **Motions for New Trial: Appeal and Error.** If an appellant has assigned errors properly presented in a motion for new trial, then the appellant need not also assign as error the overruling of the motion for new trial.
2. _____: _____. An appellate court will affirm the district court's denial of a motion for new trial absent an abuse of discretion.
3. **Judgments: Equity: Time.** A litigant seeking the vacation of a prior decree or judgment after term may take one of two routes. The litigant may proceed either under Neb. Rev. Stat. § 25-2001 (Reissue 1989) or under the district court's independent equity jurisdiction.
4. **Attorneys at Law: Fraud.** A party should not be forced to answer for the fraud of opposing counsel.
5. **Attorney and Client: Fraud.** If anyone must lose because of the fraud of a lawyer, it should be the party who selected and employed that lawyer as his counsel.
6. **Attorney and Client.** A litigant is not responsible for the acts of an attorney that he has not hired. However, a litigant is responsible, as against his opponent, for the acts of an attorney that he has hired.
7. **Courts: Justiciable Issues.** A court decides real controversies and determines rights actually controverted, and does not address or dispose of abstract

questions or issues that might arise in a hypothetical or fictitious situation or setting.

8. **Courts: Jurisdiction.** The existence of an actual case or controversy is necessary for the exercise of judicial power in Nebraska.
9. **Jurisdiction: Words and Phrases.** Jurisdiction is a court's power or authority to hear a case.
10. **Child Support: Modification of Decree: Appeal and Error.** An appellate court reviews modifications of child support de novo on the record and will affirm the judgment of the trial court absent an abuse of discretion.
11. **Child Support: Visitation.** A failure to pay child support does not justify a parent's unilateral withdrawal of visitation rights, and a failure to allow visitation does not justify a parent's unilateral nonpayment of support.
12. **Child Support.** The power of a court to suspend child support should be exercised only as a last resort or where it is apparent that to do so affords the only remedy that can reasonably be expected to fit the mischief.
13. **Child Support: Visitation.** A court may suspend child support payments when the custodial parent deprives the noncustodial parent of visitation and there is no showing that the children are in need.
14. **Appeal and Error.** As to matters of law, an appellate court has an obligation to reach its own independent conclusion.
15. **Child Support: Interest: Time.** Under Neb. Rev. Stat. § 42-358.02 (Reissue 1988), prior to September 6, 1991, interest on delinquent child support payments accrued at a rate determined by Neb. Rev. Stat. § 45-104.01 (Reissue 1988).
16. _____: _____: _____. Under Neb. Rev. Stat. § 42-358.02 (Cum. Supp. 1992), as of September 6, 1991, interest on delinquent child support payments accrues at a rate determined by Neb. Rev. Stat. § 45-103 (Reissue 1988).
17. **Estoppel.** When a person, knowing her rights, takes no steps to enforce those rights until the adverse party has, in good faith, changed his position such that he could not be restored to his former state if the rights are enforced, the delay becomes inequitable and the person is estopped from asserting the rights.
18. **Courts: Equity: Judgments: Interest.** A court of equity has discretion to allow or withhold interest as is reasonable and just, except in cases where interest is recoverable as a matter of right.
19. _____: _____: _____: _____. A court of equity does not have discretion to withhold interest on decrees or judgments for the payment of money.
20. **Judgments.** A decree or judgment for the payment of money is one which is immediately due and collectible where its nonpayment is a breach of duty on a judgment debtor.

Appeal from the District Court for Wheeler County: RONALD D. OLBERDING, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Richard A. Welch, Jr., pro se, and, on brief, George T. Babcock, of Babcock & Associates, for appellant.

Curtis A. Sikyta for appellee.

HASTINGS, C.J., WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ.

WHITE, J.

This case arises from a decree of dissolution and a series of related motions. In January 1988, Diane Dugan (Dugan), then known as Diane L. Welch, filed a petition for dissolution of her marriage to Richard A. Welch, Jr. (Welch). Welch filed a special appearance, a motion to transfer jurisdiction to Illinois (his claimed state of legal residence), and a motion for a stay under the Soldiers' and Sailors' Civil Relief Act. The district court denied the special appearance, finding that it had jurisdiction over Welch, and denied both motions.

In November 1988, the court entered its decree of dissolution. The decree awarded custody of the parties' two minor children to Dugan and awarded Dugan $280.80 per month in child support. The decree ordered Welch to maintain health and dental coverage for the children, and provided that Dugan would be responsible for any sums not covered by the insurance. The decree also awarded Dugan $1,500 in attorney fees and $583 in travel expenses. The remaining portions of the decree are not relevant to the present appeal. The decision was not appealed.

In June 1991, represented by a new attorney, Welch filed a "cross-petition" which alleged that his divorce attorney had committed various acts of fraud. Welch requested that the court vacate the divorce decree. The parties and the court have treated this cross-petition as a motion to vacate, and we will do likewise. In October 1991, Dugan demurred to the motion to vacate, and Welch filed a motion for a continuance.

On November 12, 1991, the district court held a hearing on Welch's motion to vacate. The court overruled the demurrer, denied the motion for a continuance, and denied the motion to vacate.

There followed a series of three motions. Welch timely filed a motion for new trial and also filed a motion to determine sums due. Dugan filed a motion, under the Nebraska Child Custody Jurisdiction Act (NCCJA), Neb. Rev. Stat. § 43-1201 et seq. (Reissue 1988), to transfer jurisdiction to Colorado, where she

and the children had moved.

On August 31, 1992, the district court held a hearing on the three motions. The court denied Welch's motion for new trial, determined various sums due, and granted Dugan's motion to transfer jurisdiction. Welch appealed and Dugan cross-appealed. Under our authority to regulate the caseloads of the appellate courts of this state, we removed the case to this court.

On appeal, Welch asserts that the district court erred in failing to vacate the decree and in transferring jurisdiction to Colorado. On cross-appeal, Dugan asserts that the district court erred in determining the sums due with respect to child support, fees, and costs. We address each alleged error in turn.

Welch has assigned as error the district court's failure to vacate the decree. Welch's notice of appeal is not timely with respect to the court's denial of his motion to vacate. Technically, then, this assignment of error is incorrect.

Welch's technical mistake is not fatal. If an appellant has assigned errors properly presented in a motion for new trial, then the appellant need not also assign as error the overruling of the motion for new trial. See *Maher v. State*, 144 Neb. 463, 13 N.W.2d 641 (1944). Welch's motion for new trial alleges that the denial of his motion to vacate was contrary to law. Therefore, Welch has preserved the substantive issue of vacating the decree for our review and has adequately assigned the error.

The district court's failure to vacate the decree arrives before this court by way of Welch's motion for new trial, which was denied. An appellate court will affirm the district court's denial of a motion for new trial absent an abuse of discretion. *Kopecky v. National Farms, Inc.*, 244 Neb. 846, 510 N.W.2d 41 (1994); *Wolfe v. Abraham*, 244 Neb. 337, 506 N.W.2d 692 (1993). To determine whether the district court correctly denied Welch's motion for new trial, we must determine whether, as Welch contends, the district court's failure to vacate the decree was contrary to law.

Welch first argues that the court should have vacated the decree based on various acts of fraud committed by his divorce attorney. A litigant seeking the vacation of a prior decree or judgment after term may take one of two routes. *DeVaux v.*

DeVaux, 245 Neb. 611, 514 N.W.2d 640 (1994). The litigant may proceed either under Neb. Rev. Stat. § 25-2001 (Reissue 1989) or under the district court's independent equity jurisdiction. *DeVaux, supra*. See, *Joyce v. Joyce*, 229 Neb. 831, 429 N.W.2d 355 (1988); *Emry v. American Honda Motor Co.*, 214 Neb. 435, 334 N.W.2d 786 (1983). Welch concedes that his action does not fall within the confines of § 25-2001 and therefore that he may proceed, if at all, under the court's general equity jurisdiction.

Welch alleges that his divorce attorney committed numerous fraudulent acts. The first set of allegedly fraudulent acts revolves around a special appearance. Welch testified that he initially hired his divorce attorney to enter a special appearance *contesting* jurisdiction. Through what appears to have been a typographical error, the divorce attorney filed a special appearance *consenting* to jurisdiction. Realizing the error, the divorce attorney asked the district court for leave to amend the special appearance. The district court found that Welch had consented to jurisdiction and also that by asking for affirmative relief, Welch had subjected himself to the jurisdiction of the court. Welch testified that his divorce attorney failed to advise him of the flawed special appearance and instead told him that the judge had said, "I have jurisdiction because I have jurisdiction." In addition, Welch claims, his divorce attorney never told him how to appeal the denial of his special appearance.

The second set of allegedly fraudulent acts revolves around a motion for a stay under the Soldiers' and Sailors' Civil Relief Act. Welch's divorce attorney did file a motion to stay the proceedings. The district court, however, found that Welch had ample time to prepare his case and that the motion was untimely. Welch testified that his divorce attorney told him that the district court had ruled that the Soldiers' and Sailors' Civil Relief Act was irrelevant.

The third set of allegedly fraudulent acts revolves around the procedures for appeal. Welch testified that his divorce attorney advised him that to appeal his case, Welch would have to ask the trial judge's permission. According to Welch, his divorce attorney further advised him that the judge "had it out" for

Welch and was not going to do anything for Welch. As to alternative remedies, Welch claims, his divorce attorney suggested that Welch sue the judge in federal court but added that because he, the attorney, was not sworn before the federal bench, Welch would have to find a new attorney.

Based on these alleged acts of fraud, Welch sought the vacation of the dissolution decree. Some courts have found that fraud perpetrated by an attorney on his own client can form the basis for vacating a decree. See, *United States v. Throckmorton*, 98 U.S. (8 Otto) 61, 66, 25 L. Ed. 93 (1878) (stating, in dicta, that "where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat . . . there has never been a real contest in the trial or hearing of the case," and the judgment may be set aside); *Leeker v. Leeker*, 23 Ariz. 170, 202 P. 397 (1921) (following *Throckmorton, supra*, court vacates divorce decree because wife's attorneys had financial incentive to disregard, and did disregard, wife's instructions to obtain a settlement and a legal separation but not a divorce). See, also, *Rhoades v. Rhoades*, 157 Cal. App. 3d 169, 211 Cal. Rptr. 531 (1984) (stating that default divorces should be set aside readily, court set aside default divorce decree because husband's divorce attorney reassured husband and then did nothing to represent husband, allowing default to be entered); *Younkins v. Younkins*, 121 Ill. App. 2d 416, 257 N.E.2d 521 (1970) (court vacates default divorce decree because wife's attorney consented to a default judgment without wife's authority). These cases are based on the principle that fraud vitiates everything it touches. See, *Throckmorton, supra*; *Leeker, supra*.

A contrasting principle is that a party should not be forced to answer for the fraud of opposing counsel. See *Brooks v. Brooks*, 184 Md. 419, 41 A.2d 367 (1945) (despite wife's allegations that her attorney acted with reckless disregard for her rights, court refused to vacate divorce decree). This court has recognized this principle in the context of a negligence action. See *Sargent Feed & Grain v. Anderson*, 216 Neb. 421, 344 N.W.2d 59 (1984).

In *Sargent Feed & Grain*, the plaintiff sent the defendants requests for admissions, and the defendants failed to respond

within 30 days. The plaintiff filed a motion for summary judgment based on the admissions, and the court granted the plaintiff summary judgment. After obtaining new counsel, the defendants filed a motion to vacate the judgment. Reasoning that the defendants' original counsel had mishandled the case, depriving the defendants of their day in court, the court granted the motion to vacate. The case proceeded to trial, and the defendants prevailed.

On appeal, this court held that the trial court had improperly granted the motion to vacate. We found that the negligence of the defendants' counsel did not justify vacating the judgment in favor of the plaintiff. The rationale for this decision was that the plaintiff should not be deprived of a favorable judgment due to the neglect of the opposing attorney:

> The neglect and fault of the defendants' [original counsel] could not be a basis for setting aside the judgment in this case. Certainly his conduct is not chargeable to the plaintiff. *If anyone must lose because of the neglect of a lawyer, it should be the party who selected and employed that lawyer as his counsel.*

(Emphasis supplied.) *Id.* at 425, 344 N.W.2d at 61-62.

Although Welch's motion to vacate is based on fraud and not negligence or neglect, we find that the rationale of *Sargent Feed & Grain* applies. Welch's dispute is with his divorce attorney, not with Dugan. There is no suggestion that Welch's failure to timely appeal the denial of his special appearance or the decree is a result of any act of Dugan's; yet the relief prayed for is against Dugan. Although both Welch and Dugan, arguably, can be seen as innocent parties in this legal quagmire, it is Welch, and not Dugan, who must ultimately be responsible for the acts of Welch's own divorce attorney. The district court properly refused to vacate the decree on the basis of the alleged fraud of Welch's divorce attorney.

Welch also argues that the district court should have vacated the decree because it did not have personal jurisdiction over him. At the dissolution hearing and in the decree, the district court stated that it had jurisdiction over both Dugan and Welch. These findings were not timely appealed. Welch argues that he could not file a timely appeal because his attorney lied to him about the process for appeal. The acts of Welch's attorney,

as we have just explained, are not cause for a court to vacate a decree.

Welch cites three cases which, he claims, compel the court to vacate the decree on the basis of a lack of personal jurisdiction: *Kaufmann v. Drexel*, 56 Neb. 229, 76 N.W. 559 (1898); *Kepley v. Irwin*, 14 Neb. 300, 15 N.W. 719 (1883); and *Eaton v. Hasty*, 6 Neb. 419, 29 Am. Rep. 365 (1877). These three cases stand for the following proposition: While a court will presume that an attorney appearing before the court on behalf of a litigant is authorized to do so, a court may vacate a judgment if the litigant later shows that the attorney appearing on his behalf was unauthorized to do so. In other words, if Welch had never hired his divorce attorney but the attorney had appeared in court purporting to represent Welch, then all of the acts of the attorney would be void and the judgment based on those acts would be void.

The proposition embodied in the three cases cited by Welch does not apply to Welch. The proposition concerns the acts of an *unauthorized attorney*; Welch's case concerns the *unauthorized acts* of an *authorized attorney*. A litigant is not responsible for the acts of an attorney that he has not hired. However, as we have explained above, a litigant is responsible, as against his opponent, for the acts of an attorney that he has hired. Welch's argument that the decree should be vacated because the district court lacked personal jurisdiction is without merit. The district court's denial of Welch's motion to vacate was not contrary to law. Accordingly, the district court did not abuse its discretion in denying Welch's motion for new trial.

Welch next contends that the district court erred in transferring jurisdiction to Colorado under the NCCJA. Upon Dugan's motion to transfer jurisdiction under the NCCJA, the district court found that Wheeler County, Nebraska, was an inconvenient forum. The court granted Dugan's motion to transfer and ordered Dugan to file an action in the district court for Weld County, Colorado, before September 14, 1992, at 1 p.m. or report for a hearing on a contempt motion.

As a threshold matter, we note that the NCCJA does not authorize a court to *transfer jurisdiction*. The NCCJA allows a court to *decline jurisdiction* under certain circumstances. We will treat Dugan's motion to transfer jurisdiction as a motion to

decline jurisdiction.

The NCCJA allows a court to "decline to exercise its jurisdiction any time *before making a decree* if [the court] finds that it is an inconvenient forum to make a custody determination." (Emphasis supplied.) § 43-1207(1). A custody decree is defined by the NCCJA as "a custody determination contained in a judicial decree or order made in a custody proceeding." § 43-1202(4). A custody determination includes court decisions providing for the custody of a child or visitation rights, but does not include decisions relating to child support or other monetary obligations. § 43-1202(2).

At the time the motion to decline jurisdiction was filed, neither party had requested a custody determination. The record does not reveal any custody proceedings pending before the district court in Nebraska. Moreover, it appears that there were no custody proceedings pending before the district court in Colorado. Dugan, in effect, is asking Nebraska to decline jurisdiction in the abstract.

"[A] court decides real controversies and determines rights actually controverted, and does not address or dispose of abstract questions or issues that might arise in a hypothetical or fictitious situation or setting." *State v. Baltimore*, 242 Neb. 562, 568, 495 N.W.2d 921, 926 (1993). Accord *Mullendore v. Nuernberger*, 230 Neb. 921, 434 N.W.2d 511 (1989). The existence of an actual case or controversy is necessary for the exercise of judicial power in Nebraska. *Baltimore, supra*; *Mullendore, supra*. Without an actual case or controversy, a court has no opportunity to exercise judicial power and, consequently, has nothing to decline. In the absence of an actual dispute, the district court had nothing over which to take—or decline—jurisdiction.

Dugan might argue that she was asking the court to decline its continuing jurisdiction over child custody. Jurisdiction is a court's power or authority to hear a case. *Millman v. County of Butler*, 235 Neb. 915, 458 N.W.2d 207 (1990); *Blitzkie v. State*, 228 Neb. 409, 422 N.W.2d 773 (1988). Accord *Baltimore, supra*. Accordingly, continuing jurisdiction means that the court is continually empowered to hear matters of child custody and visitation; it does not mean that the court is continually

exercising jurisdiction. A court's continuing jurisdiction over matters of child custody and visitation does not, by itself, constitute a custody determination and therefore cannot be the basis for declining jurisdiction. The district court improperly declined jurisdiction under the NCCJA.

On cross-appeal, Dugan first contends that the trial court erred in abating child support. An appellate court reviews modifications of child support de novo on the record and will affirm the judgment of the trial court absent an abuse of discretion. *Marr v. Marr*, 245 Neb. 655, 515 N.W.2d 118 (1994); *Sabatka v. Sabatka*, 245 Neb. 109, 511 N.W.2d 107 (1994). In order to properly address this assignment of error, we briefly summarize the relevant portions of the record.

On August 2, 1991, about 6 weeks after Welch filed his motion to vacate, the district court held a hearing on the issue of temporary visitation. The court granted specific visitation, including telephone visitation, pending trial on the motion to vacate.

Welch subsequently filed an application for contempt, and on August 19, the district court held a hearing on the application. At this hearing, Welch testified that he had been unable to exercise his temporary visitation; he had not reached the children on the phone and had not received an address so he could meet the children in person. He also testified that he had not seen the children since 1988 and had not spoken with them on the phone for over a year. Finding that the recent visitation problems were a result of miscommunication between Dugan and her attorney, the court decided not to hold Dugan in contempt. However, the court did state that Dugan had "been pulling [Welch's] chain" by failing to allow telephone calls and visitation. The court stated that it had asked the parties and counsel to try and work something out but that the parties were "at logger-heads." The court ordered very specific visitation so that neither party could claim to be mistaken about the arrangements.

Welch soon filed another application for contempt, claiming that Dugan had again failed to allow visitation, and on October 1, the district court held a hearing on the application. Dugan did not appear personally at the hearing. According to her

attorney, Dugan had argued the case in Colorado and believed Colorado had jurisdiction. The court stated that it could not hold Dugan in contempt without her personal presence. However, the court issued a bench warrant for Dugan's arrest. The court then heard evidence as to visitation that had been denied. The court abated child support as of October 1, 1991.

The record contains sparse information as to visitations occurring after this hearing. It appears that Welch and his mother visited with the children in Colorado in early October 1991. It also appears that Welch attempted a visit during late November and early December. Welch has testified that he has spent approximately $6,000 attempting to exercise visitation. There is no information in the record as to the success or extent of these attempts.

On August 31, 1992, the district court held a hearing on Welch's motion to determine sums due. The court's journal entry states that "child support was abated by this Court as [sic] October 1, 1991, and has not, and will not be reinstated." At the hearing, the court elaborated on its reasons for abating child support:

> The last thing as to child support, child support was abated October 1, 1991 and the reason for that was that [Dugan] was failing to obey the orders of the Court as to visitations. It appears there has been a continuing problem probably due to both parties' fault. The Court is not going to change that, that was not changed by the parties or counsel as of this date and it remains abated as of this date.
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> . . . .
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> . . . The mother has the custody of the children. The father is entitled to reasonable visitation of those children, including telephone visitation. If you would follow the orders of the Court in that area you would not have any problems. The father is entitled to reasonable visitation. He may have a duty of support but at this point since neither party — at least [Dugan] does not seem to want to follow the orders of the Court as to visitation. I am not going to order any child support.

The question which we must now determine is whether the

district court erred in abating child support. We find that it did not.

As a general rule, the custodial parent's right of support and the noncustodial parent's right of visitation are entitled to separate enforcement. A failure to pay child support does not justify a parent's unilateral withdrawal of visitation rights, and a failure to allow visitation does not justify a parent's unilateral nonpayment of support. See, *State v. Beck*, 238 Neb. 449, 471 N.W.2d 128 (1991); *Conrad v. Conrad*, 208 Neb. 588, 304 N.W.2d 674 (1981); *Eliker v. Eliker*, 206 Neb. 764, 295 N.W.2d 268 (1980). "Neither of the parties is authorized to interfere with the court's orders and only the court can determine what, if any, adjustments should be made." *Id.* at 773, 295 N.W.2d at 273.

That is not to say, however, that a court is without power to suspend child support. The frustration of enforcing visitation rights from hundreds of miles away cannot be ignored. *Dep't of Public Aid v. Peterson*, 156 Ill. App. 3d 657, 509 N.E.2d 146 (1987). The power of a court to suspend child support should be exercised only as "a last resort or where it is apparent that to do so affords the only remedy that can reasonably be expected to fit the mischief." *Biesecker v. Biesecker*, 190 Neb. 808, 809, 212 N.W.2d 576, 577 (1973). Specifically, we have held that a court may suspend child support payments when the custodial parent deprives the noncustodial parent of visitation and there is no showing that the children are in need. See *McGee v. McGee*, 190 Neb. 415, 209 N.W.2d 339 (1973).

Since the divorce, Dugan has effectively deprived Welch of any meaningful visitation. Welch did not see the children at all from 1988 until August 1991. Beginning in August 1991, the district court attempted to reunite Welch and his children. Largely unsuccessful in this attempt, the court ordered child support abated. There has been no indication that the abatement, effective October 1, 1991, has adversely affected the children or that they are lacking in care. In August 1992, the district court found that there had been a continuing problem with visitation and ordered child support to remain abated. We conclude that the district court did not err in abating child support.

Dugan last contends that the district court erred in determining various sums due. We briefly address each of the arguments presented in Dugan's brief. In so doing, we are mindful that, as to matters of law, an appellate court has an obligation to reach its own independent conclusion. *Duggan v. Beermann*, 245 Neb. 907, 515 N.W.2d 788 (1994); *Goeke v. National Farms, Inc.*, 245 Neb. 262, 512 N.W.2d 626 (1994).

Dugan argues that the district court erred in assessing too little interest on delinquent child support payments. The court ordered that interest on child support should be calculated at 14 percent before October 1, 1991, and 6.86 percent thereafter.

It is undisputed that child support payments become delinquent the day after they are due, and interest begins to accrue 30 days later. See Neb. Rev. Stat. § 42-358.02(2) (Cum. Supp. 1992). At issue, however, is the proper rate of interest. The rate of interest on delinquent child support payments is governed by § 42-358.02, which was amended in 1991.

Before amendment, § 42-358.02 provided that interest accrued at the rate specified by Neb. Rev. Stat. § 45-104.01 (Reissue 1988), which prescribed a flat rate of 14 percent per annum. See § 42-358.02(1) (Reissue 1988). The amendments to § 42-358.02 became effective on September 6, 1991. The amendments do not affect interest which accrued prior to September 6. See § 42-358.02(5) (Cum. Supp. 1992).

As of September 6, 1991, delinquent child support payments accrue interest under the amended statute. See § 42-358.02(5) (Cum. Supp. 1992). Under the amended statute, interest accrues at the rate specified by Neb. Rev. Stat. § 45-103 (Reissue 1988), which prescribes a fluctuating rate related to certain bond yields. See § 42-358.02(1). The amended statute directs the court to apply the rate "in effect on the date of the most recent order or decree." *Id.*

Applying these statutes to the present action should have resulted in a three-part order with respect to interest on delinquent child support payments. First, until September 5, 1991, under the prior statute, interest accrued at the rate of 14 percent per annum. Second, beginning on September 6, under the amended statute, interest accrued at the rate, established pursuant to § 45-103, in effect on the date of the "most recent

order or decree." See § 42-358.02(1). On September 6, the most recent order or decree was the dissolution decree, entered on November 18, 1988. Therefore, beginning on September 6, child support accrued at the rate in effect on November 18, 1988. Third, on October 1, 1991, the district court ordered an abatement of child support. This order supplanted the decree as the "most recent order or decree." Therefore, beginning on October 1, interest should have been calculated at the rate which was in effect on that date.

The district court failed to account for the effective date of the amended statute as triggering a change in the applicable interest rate. As a result, the court erred, as a matter of law, in calculating the interest on delinquent child support payments. On remand, the district court shall calculate interest for the following periods at the following rates: Until September 5, 1991, interest shall be calculated at 14 percent per annum. From September 6 until September 30, 1991, interest shall be calculated at the rate, established pursuant to § 45-103, in effect on November 18, 1988. As of October 1, 1991, interest shall be calculated at the rate, established pursuant to § 45-103, in effect on October 1.

Dugan next argues that the district court erred in refusing to award her payment of various medical and dental expenses. The decree provides that Welch shall maintain health and dental insurance for the children and that Dugan shall be responsible for any sums not covered by insurance. Dugan submitted evidence demonstrating that she and her husband had paid insurance premiums from October 1989 until May 1992 totaling $2,040, that expenses from March 1987 until May 1992 totaled $4,463.10, and that the insurance had covered $1,109.53 of these expenses.

In ruling on this claim, the court stated:

> As to medical payments or medical expenses, [Welch] has testified insurance was available. Both parties have apparently avoided each other from day one in this case and have not communicated and come in here at this late date after the payments have already been incurred, it is too late to apply those toward any insurance coverage, it is too late as far as the Court is concerned and [Dugan] is

> estopped from asserting those medical payments to [Welch].

Accordingly, the district court refused to order any payments for medical expenses.

When a person, knowing her rights, takes no steps to enforce those rights until the adverse party has, in good faith, changed his position such that he could not be restored to his former state if the rights are enforced, the delay becomes inequitable and the person is estopped from asserting the rights. *Nathan v. McKernan*, 170 Neb. 1, 101 N.W.2d 756 (1960); *Whitaker v. Stout*, 166 Neb. 850, 91 N.W.2d 44 (1958); *State v. Nielsen*, 163 Neb. 372, 79 N.W.2d 721 (1956). This estoppel rule parallels the doctrine of laches, which bars a claimant whose unreasonable delay in protecting his right has worked inequitably to disadvantage or prejudice another. See, *Kracl v. Loseke*, 236 Neb. 290, 461 N.W.2d 67 (1990); *Hanthorn v. Hanthorn*, 236 Neb. 225, 460 N.W.2d 650 (1990). See, also, 1 Dan B. Dobbs, Dobbs Law of Remedies § 2.3(5) at 89 (2d ed. 1993) ("[e]stoppel is closely related to and sometimes identical with laches." If the plaintiff is barred only by an unreasonable and prejudicial delay, laches appears to be merely an instance of estoppel). Because the district court decided the case on the ground of estoppel, we will review the decision on that basis.

As reflected in the record, Dugan purchased numerous medical and dental services for the children. The decree clearly provides that Welch is obligated to maintain medical and dental coverage for the children. However, Dugan never attempted to enforce this provision of the decree.

Dugan testified that she had attempted to contact Welch at various addresses, without success. She also testified that she never received any information from Welch regarding insurance. However, there is no evidence to suggest that Dugan ever asked a court to enforce the decree with respect to medical or dental bills.

Furthermore, although Welch may have been difficult, or even impossible, to contact at some points in time, some of the medical bills presented by Dugan were incurred at times when Dugan clearly could have contacted Welch. For example, Welch was in the U.S. Navy until March 1989; until that time, Dugan

could have contacted Welch through the Navy. Welch filed his motion to vacate in June 1991; after that time, Dugan could have contacted Welch through his attorney of record. Based on the record, we are unable to say that Dugan made any reasonable efforts to enforce her rights.

If Dugan's rights were now to be enforced, Welch would suffer prejudice. At the August 31, 1992, hearing, Welch testified as to his insurance coverage as follows: Welch was separated from the Navy in March 1989, and his medical benefits ceased in July 1989. In August 1989, Welch found employment with Bob O'Connor Ford, which offered a family health plan. From August 1989 until May 1990, Welch and the children were covered under this family health plan. In May 1990, Welch's employer changed health plans. Under the new plan, in order to have the children covered outside the local area, certain documents had to be completed by the custodial parent. Welch testified that he attempted to have the documents sent to Dugan in O'Neill, Nebraska. Welch also contacted Dugan's counsel and the clerk of the court in order to find out where Dugan was located. Additionally, Welch spoke with Jan Krotter, Wheeler County Attorney, regarding the insurance. Effective August 11, 1991, Welch was discharged from Bob O'Connor Ford. Since that time Welch has been receiving unemployment compensation. Welch testified that the "Public Aid Department" would authorize medical coverage for the children only if they were in his possession.

Distilled, these facts show that Welch complied with the decree by obtaining the required coverage for the children until at least August 11, 1991. Any expenses incurred before that date should have been presented to Welch's insurer so that the insurer could determine whether the expenses were covered and would be paid. Dugan's delay in presenting Welch with the medical bills denied Welch the opportunity to submit these expenses to his insurer. Welch cannot now recoup this lost opportunity. Therefore, he has suffered prejudice as a result of Dugan's delay.

After August 11, 1991, however, it appears that Welch no longer had insurance coverage for the children. Although the children apparently would be covered by the public aid

department, this coverage applied only when the children were in Welch's possession. This coverage is clearly inadequate under the decree. The decree awarded custody of the children to Dugan, required Welch to obtain medical and dental insurance for the children, and required Dugan to pay any uncovered expenses. Clearly, the decree contemplated that Welch's insurance would cover the children while they were in Dugan's possession.

Because Welch has not had insurance coverage for the children since August 11, 1991, he has not been prejudiced by Dugan's delay in enforcing her rights. If Dugan had, for example, handed Welch medical bills in October 1991, he would not have been able to submit those bills to an insurance company. As a matter of law, Welch has not suffered prejudice as to medical and dental expenses incurred after August 11, 1991. Therefore, the district court erred in finding that Dugan was wholly estopped from seeking repayment for medical and dental expenses.

On the present record, we are unable to determine the extent of Welch's liability. The decree, as we have stated, provides that Welch is responsible for maintaining medical and dental insurance and that Dugan is responsible for uncovered expenses. The decree does not assign responsibility for medical and dental expenses incurred in the absence of an insurance policy. We therefore remand the cause to the district court for an equitable determination of which party is liable for the expenses incurred after August 11, 1991.

Dugan next argues that the trial court erred in finding that the "other judgments of [Dugan] had been paid." Brief for appellee at 28. At the hearing on the motion to determine sums due, in addition to claiming sums due for child support and medical expenses, Dugan claimed that Welch owed her the following sums: (1) witness fees pursuant to a promise from Welch to Dugan, (2) attorney fees pursuant to the dissolution decree, and (3) interest on a "Contempt Judgment of July 28, 1988."

Addressing each of these sums in turn, we note that as a result of the hearing on the motion to determine sums due, the court ordered payment of the witness fees and the attorney fees.

Clearly, the court did not, as Dugan suggests, find that these sums had been paid. As to the contempt judgment, the court found that Welch had been ordered to pay Dugan $583 and that Welch had paid that amount. A document submitted into evidence and stipulated to by the parties purports to calculate "Principal and Interest on Contempt Judgment of July 28, 1988." This document shows that the principal amount of $583 was paid in February 1991, and shows interest due and owing in the amount of $128.03. The court did not err in finding that the principal had been paid.

Dugan also argues, however, that the court erred in failing to determine interest due on the judgments. We have already addressed the issue of interest on child support. The witness fees were first ordered to be paid at the hearing on the motion to determine sums due, and therefore, no interest on those fees had yet accrued. We need only consider whether interest should have been calculated on the attorney fees and on the contempt judgment.

A court of equity has discretion to allow or withhold interest as is reasonable and just, except in cases where interest is recoverable as a matter of right. *Kullbom v. Kullbom*, 215 Neb. 148, 337 N.W.2d 731 (1983); *Cumming v. Cumming*, 193 Neb. 601, 228 N.W.2d 296 (1975). Our statutes provide that "[j]udgment interest *shall* accrue on decrees and judgments for the payment of money from the date of rendition of judgment until satisfaction of judgment." (Emphasis supplied.) Neb. Rev. Stat. § 45-103.01 (Reissue 1988). The statutes also provide that the interest rate for "decrees and judgments for the payment of money" *shall* be 1 percentage point above certain bond yields, the exact rate to be distributed by the State Court Administrator to all Nebraska judges. See § 45-103. Based on the mandatory language of these statutes, we hold that a court of equity does not have discretion to withhold interest on decrees or judgments for the payment of money.

A decree or judgment for the payment of money is one which is immediately due and collectible where its nonpayment is a breach of duty on a judgment debtor. See, *Dryden v. Dryden*, 205 Neb. 666, 289 N.W.2d 525 (1980); *Cumming, supra*; *Patterson v. Spelts Lumber Co.*, 166 Neb. 692, 90 N.W.2d 283

(1958), *overruled on other grounds, Gillespie v. Hynes*, 168 Neb. 49, 95 N.W.2d 457 (1959). Interest does not accrue until the debt becomes due. See, *Dryden, supra* (interest on installment payment accrues when each individual payment becomes due); *Cumming, supra* (where divorce decree required wife to pay husband a portion of a future distribution from her father's estate, money was not due until wife received the distribution, and interest would not accrue until that date).

The court in the present action found due "[a]ttorney fees in the amount of $1,400.00 from [Welch] to [Dugan], being the balance of the $1,500.00 ordered November 14, 1988." November 14, 1988, was the date of the parties' dissolution hearing, which was followed on November 18 by the entry of a dissolution decree. The decree provided that Welch "should pay $1,500.00 toward [Dugan's] attorney fees. Said amount is to be paid within 90 days of this date."

The award of attorney fees is a judgment for the payment of money, the payment being due 90 days after November 18, 1988. As a matter of law, Dugan is entitled to interest on her award of attorney fees. The district court erred in failing to determine the amount of this interest and should determine that amount on remand.

The contempt judgment is not found separately in the record but is referenced in the dissolution decree. According to the decree: "On July 28, 1988, [Welch] was held in willful contempt and ordered to pay [Dugan's] expenses to retrieve the children from Virginia in the amount of $583.00." This award of travel expenses is a judgment for the payment of money, the payment being due on July 28, 1988. As a matter of law, Dugan is entitled to interest on her award of travel expenses. The district court erred in failing to determine the amount of this interest and should determine that amount on remand.

We note in passing that the district court also determined various sums due to Welch, his attorney, the guardian ad litem, and Dugan's present husband, Kevin Lyle. Those determinations have not been appealed, and we express no opinion as to whether interest is due thereon.

In the last sentence of her brief, Dugan asks this court to award her attorney fees and costs for appeal. Dugan has not

filed a separate motion for attorney fees, together with a supporting affidavit, as required by Neb. Ct. R. of Prac. 9F (rev. 1992).

In conclusion, we hold that the district court properly denied Welch's motion for new trial; that judgment is affirmed. The district court improperly sustained Dugan's motion to decline jurisdiction; that judgment is reversed. In ruling on the motion to determine sums due, the district court erred in its calculation of interest on delinquent child support payments, in finding that Dugan was wholly estopped from recovering medical and dental expenses, and in failing to determine the interest due on Dugan's awards of attorney fees and travel expenses. The judgment on the motion to determine sums due is reversed and the cause remanded for further proceedings consistent with this opinion.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

BOSLAUGH, J., participating on briefs.

DOROTHY STORJOHN, APPELLANT, V. WILLIAM J. FAY, APPELLEE.

519 N.W.2d 521

Filed July 22, 1994. No. S-92-1123.

1. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on the claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
2. **Jury Instructions.** The proper method of presenting a case to a jury in its instructions is by a clear and concise statement by the trial court of the issues which find support in the evidence.
3. **Jury Instructions: Appeal and Error.** An instruction which misstates the issues or defenses and has a tendency to mislead the jury is erroneous.
4. **Jury Instructions: Negligence: Proximate Cause: Proof: Appeal and Error.** Where a jury is properly instructed concerning the plaintiff's burden to prove that the defendant's negligence was the proximate cause of the injury, it is

ordinarily not error to give or refuse to give an instruction on unavoidable accident.

5. **Jury Instructions: Appeal and Error.** It is error to give an unavoidable accident instruction where there is no evidence in the record to give legal support to the defense that the accident was unavoidable.
6. **Words and Phrases.** An unavoidable accident has been defined as an unexpected catastrophe which occurs without any of the parties thereto being to blame for it.
7. **Negligence: Motor Vehicles.** A sudden or momentary loss of consciousness while driving is a complete defense to an action based on negligence if such a loss of consciousness was not foreseeable.
8. **Negligence: Proof.** A loss of consciousness defense is an affirmative defense, and where the plaintiff has established a prima facie case of negligence, the burden of proof, or more accurately the burden of going forward with the evidence, shifts to the defendant to establish the loss of consciousness defense.
9. _____: _____. Where a sudden loss of consciousness is an affirmative defense, a defendant's burden is twofold. First, the defendant must present sufficient evidence to establish that he suffered a sudden loss of consciousness prior to the accident, and second, that the loss of consciousness was not foreseeable.
10. **Trial: Negligence: Motor Vehicles: Evidence.** In determining whether an issue presents a question of law for the court or a question of fact for the jury, it has been held that where the evidence is conflicting as to whether the accident was caused by the driver's sudden loss of consciousness and whether the loss of consciousness was unforeseen, it is a question of fact to be determined by the jury.
11. **Trial: Evidence.** If the evidence points to only one reasonable conclusion, it is a question of law for the court.
12. **Negligence: Proof.** When a defendant pleads the affirmative defense of assumption of risk in a negligence action, the defendant has the burden to establish the elements of assumption of risk before that defense, as a question of fact, may be submitted to the jury.
13. **Expert Witnesses.** In personal injury cases where injuries are objective and the conclusion to be drawn from proved basic facts does not require special technical knowledge or science, use of expert testimony is not legally necessary to establish the cause and extent of such injuries.
14. _____. Unless the character of the injury is objective, there must be expert medical testimony to establish the causation and the extent and nature of the injuries.
15. **Negligence.** Generally, where it is undisputed that the defendant knew that he or she was subject to attacks which could result in a sudden loss of consciousness, the evidence is such that the defendant's loss of consciousness was foreseeable.
16. **Negligence: Motor Vehicles.** One who is ill must conform to the standard of a reasonable person under a like disability and may be negligent in driving at all when he or she knows that he or she is subject to such attacks.

Appeal from the District Court for Hall County: JAMES LIVINGSTON, Judge. Reversed and remanded for a new trial.

Thomas A. Wagoner for appellant.

Kenneth H. Elson for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ.

HASTINGS, C.J.

Plaintiff Dorothy Storjohn appeals from a jury verdict and judgment in favor of defendant William J. Fay. Her sole consolidated assignment of error is that the district court erred in giving a jury instruction on unavoidable accident.

In an appeal based on the claim of an erroneous jury instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *McDermott v. Platte Cty. Ag. Socy.*, 245 Neb. 698, 515 N.W.2d 121 (1994); *Vacanti v. Master Electronics Corp.*, 245 Neb. 586, 514 N.W.2d 319 (1994); *Kopecky v. National Farms, Inc.*, 244 Neb. 846, 510 N.W.2d 41 (1994).

The proper method of presenting a case to a jury in its instructions is by a clear and concise statement by the trial court of the issues which find support in the evidence. *Wilson v. Misko*, 244 Neb. 526, 508 N.W.2d 238 (1993); *Krehnke v. Farmers Union Co-Op. Assn.*, 199 Neb. 632, 260 N.W.2d 601 (1977).

An instruction which misstates the issues or defenses and has a tendency to mislead the jury is erroneous. *Wilson, supra*; *Omaha Mining Co. v. First Nat. Bank*, 226 Neb. 743, 415 N.W.2d 111 (1987).

On the evening of October 24, 1987, at approximately 7 p.m., the plaintiff was a passenger in the family pickup truck being driven by her daughter, Linda. While northbound on Elm Street in Grand Island, their vehicle was involved in a head-on collision when a southbound vehicle driven by the defendant entered the northbound lane. The plaintiff suffered personal injuries.

The plaintiff brought an action against the defendant alleging that the collision was caused by the defendant's carelessness, negligence, and recklessness in failing to yield the

right-of-way to the vehicle being operated by the plaintiff's driver. In addition, the plaintiff alleges that the defendant failed to maintain a proper lookout and failed to keep his vehicle under proper control. In his answer, the defendant denied any negligence and pled that the collision was the result of an unavoidable accident.

The defendant testified that in about 1968 or 1969, he was told that he probably had epilepsy and had been taking medication ever since. The defendant further testified that 15 years prior to the accident, he had an attack while driving down the highway. He stated that since the time of that attack, he had never passed out while driving a car; however, he had passed out at work. According to the defendant, he told a police officer after the accident that he did not remember what had happened and that he was epileptic and must have blacked out.

Over an objection by the plaintiff, the district court gave the jury an instruction on the defense of unavoidable accident. The pertinent portion of instruction No. 2 given by the court is as follows:

> In defense to the plaintiff's claim the defendant claims that the collision between the vehicles was a result of an unavoidable accident. If you find from the evidence before you that the defendant was rendered incapacitated by a sudden and unanticipated illness and that such illness causing the incapacity was the proximate cause of the accident, then the defendant was not negligent and your verdict should be for the defendant. A sudden and unanticipated illness must be one defendant did not know of or should not have known of the fact that he might be subject to such illness. If the defendant had such knowledge or should have had such knowledge of the illness which caused the incapacitation then the defendant is required to take more precautions under such circumstances than persons not subject to such illness. If you find that defendant failed to act as a reasonably prudent person under the circumstances and with such knowledge, and that such failure was a proximate cause of the accident then your verdict should be for the plaintiff and against the defendant.

The jury returned a verdict for the defendant.

The plaintiff argues that the defendant failed to meet his burden to establish the requisite elements of an unavoidable accident defense. The plaintiff's argument is based on two assertions: one, that the defendant failed to present expert testimony regarding his claim of epilepsy and the causative link between the claimed epilepsy and his loss of consciousness, and two, that the defendant failed to present evidence that his loss of consciousness was not foreseeable.

This court has held in several cases, most recently in *Maloney v. Kaminski*, 220 Neb. 55, 368 N.W.2d 447 (1985), that where, as in the present case, a jury is properly instructed concerning the plaintiff's burden to prove that the defendant's negligence was the proximate cause of the injury, it is ordinarily not error to give or refuse to give an instruction on unavoidable accident. See, also, *Schmidt v. Johnson*, 184 Neb. 643, 171 N.W.2d 64 (1969). However, this court has stated that it is error to give an unavoidable accident instruction where there is no evidence in the record to give legal support to the defense that the accident was unavoidable. *Owen, Administrator v. Moore*, 166 Neb. 226, 88 N.W.2d 759 (1958).

The unavoidable accident doctrine is well established in Nebraska and has been defined by this court as an unexpected catastrophe which occurs without any of the parties thereto being to blame for it. *Id.*; *Wright v. Lincoln City Lines, Inc.*, 163 Neb. 679, 81 N.W.2d 170 (1957). In his answer, the defendant alleged that the accident was unavoidable. However, from the record and the argument of counsel it is clear that the defendant has not based his defense upon an unavoidable accident in the ordinary negative sense where all parties prove themselves to be free from negligence; but, rather, he has characterized a sudden loss of consciousness defense as analogous to an unavoidable accident and raised it as an affirmative defense. This court has not considered whether, as in the present case, a loss of consciousness constitutes an unavoidable accident and thereby a defense to an action based on negligence.

The rationale behind a loss of consciousness defense is that where a driver was suddenly deprived of his senses by "blacking

out," he could not comprehend the nature and quality of his acts. *Moore v. Presnell*, 38 Md. App. 243, 379 A.2d 1246 (1977). The majority of courts in other jurisdictions which have addressed the defense have recognized that a sudden or momentary loss of consciousness while driving is a complete defense to an action based on negligence if such a loss of consciousness was not foreseeable. *Rogers v. Wilhelm-Olsen*, 748 S.W.2d 671 (Ky. App. 1988); *Brannon v. Shelter Mut. Ins. Co.*, 507 So. 2d 194 (La. 1987); *Knight v. Miller*, 503 So. 2d 120 (La. App. 1987); *Goodrich v. Blair*, 132 Ariz. 459, 646 P.2d 890 (Ariz. App. 1982); *Freese v. Lemmon*, 267 N.W.2d 680 (Iowa 1978); *Moore, supra*; *Lutzkovitz v. Murray*, 339 A.2d 64 (Del. 1975); *Reliance Insurance Company v. Dickens*, 279 So. 2d 234 (La. 1973); *Holcomb v. Miller*, 149 Ind. App. 46, 269 N.E.2d 885 (1971); *Wallace v. Johnson*, 11 N.C. App. 703, 182 S.E.2d 193 (1971); *van der Hout v. Johnson*, 251 Or. 435, 446 P.2d 99 (1968); *Watts v. Smith*, 226 A.2d 160 (D.C. App. 1967); *Freifield v. Hennessy*, 353 F.2d 97 (3d Cir. 1965); *Malcolm v. Patrick*, 147 So. 2d 188 (Fla. App. 1962); *Eleason v. Western Casualty & Surety Co.*, 254 Wis. 134, 35 N.W.2d 301 (1948). An exception to this general rule exists where a person knows that he is suffering from an illness which will likely cause his loss of consciousness. *Moore, supra*. Accord, *Rogers, supra*; *Knight, supra*; *Goodrich, supra*; *Lutzkovitz, supra*; *Reliance Insurance Company, supra*; *Freifield, supra*.

These courts generally hold that a loss of consciousness defense is an affirmative defense and that where, as in the present case, the plaintiff has established a prima facie case of negligence, the burden of proof shifts to the defendant to establish the loss of consciousness defense. *Rogers, supra*. See, also, *Brannon, supra*; *Knight, supra*; *Goodrich, supra*; *Moore, supra*; *Lutzkovitz, supra*; *Reliance Insurance Company, supra*; *Holcomb, supra*; *Wallace, supra*; *Freifield, supra*; *Malcolm, supra*. But see, *Myers v. Sutton*, 213 Va. 59, 189 S.E.2d 336 (1972) (court stated that the burden of proof in a negligence case never shifts, and where the plaintiff makes out a prima facie case, it is the defendant's duty to go forward with the evidence); *Tropical Exterminators, Inc. v. Murray*, 171 So. 2d 432 (Fla. App. 1965), *cert. denied* 177 So. 2d 475 (La.) (where

the court held that a sudden loss of consciousness was not an affirmative defense, since evidence of such a loss goes to the general issue of negligence).

Where a sudden loss of consciousness is an affirmative defense, a defendant's burden is twofold. First, the defendant must present sufficient evidence to establish that he suffered a sudden loss of consciousness prior to the accident, and second, that the loss of consciousness was not foreseeable. See, *Rogers, supra*; *Brannon, supra*; *Knight, supra*; *Goodrich, supra*; *Freese, supra*; *Moore, supra*; *Lutzkovitz, supra*; *Reliance Insurance Company, supra*; *Holcomb, supra*; *Wallace, supra*; *van der Hout, supra*; *Watts, supra*; *Freifield, supra*; *Malcolm, supra*.

The plaintiff argues that the defendant failed to establish the elements of a loss of consciousness defense and that, therefore, as a matter of law it was error for the trial court to instruct the jury on the issue of unavoidable accident.

In determining whether an issue presents a question of law for the court or a question of fact for the jury, it has been held that where the evidence is conflicting as to whether the accident was caused by the driver's sudden loss of consciousness and whether the loss of consciousness was unforeseen, it is a question of fact to be determined by the jury. *Watts, supra*. However, if the evidence points to only one reasonable conclusion, it is a question of law for the court. *Tannyhill v. Pacific Motor Trans. Co.*, 227 Cal. App. 2d 512, 38 Cal. Rptr. 774 (1964). See *Eleason, supra*. Cf. *Mackiewicz v. J.J. & Associates*, 245 Neb. 568, 514 N.W.2d 613 (1994) (as a matter of law, when reasonable persons can reach only one conclusion, questions of fact which would normally be submitted to a jury become questions of law for the court to decide).

In accord with this principle of law, this court has instructed that when a defendant pleads the affirmative defense of assumption of risk in a negligence action, the defendant has the burden to establish the elements of assumption of risk before that defense, as a question of fact, may be submitted to the jury. *McDermott v. Platte Cty. Ag. Socy.*, 245 Neb. 698, 515 N.W.2d 121 (1994); *Grote v. Meyers Land & Cattle Co.*, 240 Neb. 959, 485 N.W.2d 748 (1992).

In support of her contention, the plaintiff further argues that the defendant's loss of consciousness defense involves a subjective medical condition and that, therefore, expert testimony is necessary to establish his claim of epilepsy and the causative link between the epilepsy and his loss of consciousness.

This court has previously addressed the issue of when expert testimony is required and has drawn a distinction between objective and subjective medical conditions. In personal injury cases where injuries are objective and the conclusion to be drawn from proved basic facts does not require special technical knowledge or science, use of expert testimony is not legally necessary to establish the cause and extent of such injuries. *Eiting v. Godding*, 191 Neb. 88, 214 N.W.2d 241 (1974). In *Eno v. Watkins*, 229 Neb. 855, 429 N.W.2d 371 (1988), this court reaffirmed the principle of law that unless the character of the injury is objective, there must be expert medical testimony to establish the causation and the extent and nature of the injuries.

> "Where the claimed injuries are of such a character as to require skilled and professional persons to determine the cause and extent thereof, the question is one of science. Such a question must necessarily be determined from the testimony of skilled professional persons and cannot be determined from the testimony of unskilled witnesses having no scientific knowledge of such injuries. . . . When symptoms from which personal injury may be inferred are subjective only, medical testimony is required. . . ."

Eno, 229 Neb. at 858, 429 N.W.2d at 373, quoting *Eiting, supra*. See, also, *Turek v. Saint Elizabeth Comm. Health Ctr.*, 241 Neb. 467, 488 N.W.2d 567 (1992) (where the character of an alleged injury is not objective, the cause and extent of the injury must be established by expert medical testimony). This principle of law has been recognized in workers' compensation cases as well. See, e.g., *Binkerd v. Central Transportation Co.*, 236 Neb. 350, 461 N.W.2d 87 (1990) (where the character of the injury is not objective, the cause and the extent of the injury must be established by expert testimony); *Mendoza v. Omaha Meat Processors*, 225 Neb. 771, 408 N.W.2d 280 (1987) (unless

the injury's nature and effect are plainly apparent, an expert opinion is required to establish the causal relationship between the incident and the injury as well as any claimed disability consequent to such injury); *Hamer v. Henry*, 215 Neb. 805, 341 N.W.2d 322 (1983) (unless the character of the injury is objective, expert testimony is required); *Mack v. Dale Electronics, Inc.*, 209 Neb. 367, 307 N.W.2d 814 (1981) (subjective condition necessitates expert testimony).

Drawing a parallel with personal injury and workers' compensation cases, the plaintiff asserts that in the present case, the defendant was required to present expert testimony to establish his epileptic condition; however, her argument is not persuasive. Although the plaintiff is correct in asserting that epilepsy is a subjective medical condition, she is mistaken in her belief that a determination of whether the defendant in fact suffered from epilepsy is controlling in this case. The focus of the inquiry is not whether the defendant's loss of consciousness was the result of an epileptic seizure, but, rather, whether the defendant did in fact lose consciousness. The objective nature and effect of "blacking out" or losing consciousness is plainly apparent, and therefore, no expert testimony is required. Cf. *Courtright v. Youngberg*, 4 Wash. App. 234, 480 P.2d 522 (1971) (where court noted that a defendant's loss of consciousness defense did not have to be supported by medical evidence in order to be submitted to the jury). Epilepsy is important in this case only as bearing on the issue of whether defendant should have foreseen that result.

The thrust of the plaintiff's remaining argument is that the defendant failed to establish the requisite elements of a loss of consciousness defense. First, we must consider whether the evidence presented established that the defendant suddenly lost consciousness prior to the accident.

Unconsciousness Prior to the Accident

The record reveals that the only evidence the defendant presented at trial to support his contention that he suffered a sudden loss of consciousness was his own testimony. On direct examination, the defendant was asked to recall the events prior to the accident. His testimony is set forth as follows:

Q: What happened?

A: I must have — I passed out and I hit a car, first. I don't really — don't remember, but I remember, but I hit a car and then I proceeded on down the street. The car proceeded on down the street, and so, like I said, I don't know if it was — it could have been that I didn't know where I was driving or it could have — or it could have been damage from the other car that — that caused me to run in, you know, to —.

Q: Do you recall the impact of your car with the Storjohn car?

A: Yes, but I — I — more or less that's when I woke up, after that.

The defendant further testified that he told a police officer at the scene of the accident that he did not remember anything during the accident and that he must have blacked out or passed out.

The defendant's testimony as to his recollection of events prior to the accident is inconsistent and contradictory. Without corroborating evidence, either in the form of medical testimony or other witnesses, it is difficult to reasonably infer from his testimony that he was unconscious prior to the accident. Therefore, the defendant failed to present sufficient evidence to satisfy the threshold requirement for the loss of consciousness defense, and it was error for the trial court to instruct the jury on the defense.

FORESEEABILITY

However, even assuming that the defendant suffered a sudden loss of consciousness prior to the accident, we must examine the record to determine whether such a loss was foreseeable. In establishing the loss of consciousness defense, the issue of foreseeability is crucial. The defense is not available where a driver was put on notice of facts sufficient to cause an ordinary and reasonable person to anticipate that his or her driving might likely lead to injury to others. *Rogers v. Wilhelm-Olsen*, 748 S.W.2d 671 (Ky. App. 1988). Accord, *Knight v. Miller*, 503 So. 2d 120 (La. App. 1987); *Goodrich v. Blair*, 132 Ariz. 459, 646 P.2d 890 (Ariz. App. 1982); *Lutzkovitz*

v. Murray, 339 A.2d 64 (Del. 1975); *Reliance Insurance Company v. Dickens*, 279 So. 2d 234 (La. 1973); *Freifield v. Hennessy*, 353 F.2d 97 (3d Cir. 1965).

Courts have generally held that where it is undisputed that the defendant knew that he or she was subject to attacks which could result in a sudden loss of consciousness, the evidence is such that the defendant's loss of consciousness was foreseeable. See, *Eleason v. Western Casualty & Surety Co.*, 254 Wis. 134, 35 N.W.2d 301 (1948) (stating that foreseeability was established where the defendant testified he had been subject to seizures for approximately 6 years and that during these seizures he would lose consciousness for about 15 minutes); *Reliance Insurance Company, supra* (stating that it must have been foreseeable to the defendant that she would be apt to have an epileptic attack where the evidence established that she knew she had suffered from previous seizures for 8 years prior to the accident); *Knight, supra* (court reversed jury verdict for defendant and stated that defendant had not borne the burden of showing that her loss of consciousness was unforeseeable when the evidence showed she had experienced previous seizures).

When asked on direct examination when he discovered he had an epileptic condition, the defendant testified that he first started to pass out in about 1968 or 1969. He further testified that he had been under a doctor's care from the time of his first blackout to the time of the accident and had been taking Dilantin for his condition. When questioned by his counsel concerning the foreseeability of his loss of consciousness, the defendant testified as follows:

> Q: Had you had any forewarning or any reason to think that day that you might be going to have an attack?
>
> A: Not that day, no.
>
> Q: Had you been having any problems — now, I believe you told me that 15 years before the accident you were driving down the highway one time and had an attack?
>
> A: Yes.
>
> Q: Since that time to this accident in October 1987, did you ever black out driving a car?
>
> A: Not driving a car, and I drove — I blacked out at

work in different — in there and this — I said, "Well, maybe you need — maybe, you know, that mightn't" — and the doctor says, "Well, I think it's just the stress from your work that's — that that's why you have it; beings that you have driven so many miles before, why that might" — of course, I don't — I'm not saying that the doctor was right, but he said that, "I don't think that — that's probably why you don't pass out when you drive — never had a — you know, pass out driving a car."

Q: You had no reason to think you might pass out when you went down Elm Street, did you?

A: No.

Q: And your doctor said that you could drive?

A: Yes.

The defendant testified as to the medication he was taking:

Q: Mr. Fay, how long had you been taking Dilantin?

A: Ever since 1968 or nine. '69.

Q: And how often did you take it that day.

A: Well, at first, it was three times a day, and — there — and I don't remember during the accident. I think it was — it's — I take it, now, four times a day, but I — during the accident, I think it was three times a day for sure.

. . . .

Q: Okay. And you had only taken it once that day?

A: Twice. Early in the morning and at noon.

The defendant's testimony continued:

Q: And, now, your testimony is that you passed out when you were driving. Is that what you are, now, telling us?

A: Well, that was after I passed out. That's when the — they found me — I walked to my dad's to see my dad in the — on the streets, and I was already — I had already lost my license then.

Q: But you — in this, you say, "I have passed out twice in two years, once each year, and even if I wasn't driving either time," —

A: Yeah.

Q: So here you are saying that you passed out twice and hadn't been driving.

According to the defendant's own testimony, it is quite apparent that the defendant knew he was subject to seizures and as a result would lose consciousness. It is also apparent that the medication he had been taking did not control his seizures. The only evidence the defendant offers to support his contention that the seizure was not foreseeable is his belief that he would not have an attack "that day" and the fact that his doctor told him at some unstated time that he could drive. The defendant's subjective belief alone is not sufficient to establish that his loss of consciousness was not foreseeable. Furthermore, courts have found that the fact that a doctor informed a defendant that he or she could drive is not persuasive. See *Freese v. Lemmon*, 267 N.W.2d 680 (Iowa 1978).

There is no testimony in the record to support the conclusion that the driver's loss of consciousness was not reasonably foreseeable; therefore, the trial court's instruction on the defense of unavoidable accident found no support in the record.

Negligence as a Matter of Law

Considering the undisputed evidence establishing that the defendant knew he suffered from epileptic seizures, it is apparent that the defendant was negligent as a matter of law in driving his car. One who is ill must conform to the standard of a reasonable person under a like disability and may be negligent in driving at all when he or she knows that he or she is subject to such attacks. Restatement (Second) of Torts § 283C, comment *c.* (1965).

The Supreme Court of Wisconsin has specifically considered this issue and held that as a matter of law it is negligence for the defendant to drive a car when he knew that he was subject to seizures. *Eleason v. Western Casualty & Surety Co.*, 254 Wis. 134, 35 N.W.2d 301 (1948). The *Eleason* court noted:

> What is important is that he knew that he might be unable to control the car which he was driving. He also must have known that if he lost control of the car there was danger of someone being injured. Driving a car where people are to be met with on highways today is dangerous enough if one has complete control of his powers. When a driver knows

> that he may become unconscious and lose that control at any moment, he must be held negligent in attempting to drive.

Id. at 134-35, 35 N.W.2d at 303. The court concluded that where the evidence established that the defendant knew he was likely at any time to become incapacitated to control a car, that evidence by itself is sufficient to make driving a car negligence. *Id.* See, also, *Goodrich v. Blair*, 132 Ariz. 459, 461, 646 P.2d 890, 892 (Ariz. App. 1982) (where the court stated, "If the defendant's health was such that a reasonably prudent man would not risk driving a car, then the defendant is negligent by merely undertaking the task of driving, regardless of subsequent events").

Although unrelated as to facts and issues, this court has spoken on the matter of the foreseeability of epileptic attacks: "The fact that Goerke has not yet had a seizure while transporting others does not require the home to risk the safety of the boys in its charge on the basis of trial and error, and thereby invite and await disastrous results." *Father Flanagan's Boys' Home v. Goerke*, 224 Neb. 731, 738, 401 N.W.2d 461, 465 (1987).

The undisputed evidence in this case establishes that the defendant knew or should have known that he was likely to lose consciousness at any time, and therefore, his driving a car under the circumstances was negligence as a matter of law.

The judgment of the trial court is reversed and the cause remanded for a new trial at which the jury shall be instructed as to the defendant's negligence as a matter or law.

REVERSED AND REMANDED FOR A NEW TRIAL.

LABENZ TRUCKING, INC., ET AL., APPELLANTS, V. RICHARD A. SNYDER, APPELLEE.

519 N.W.2d 259

Filed July 22, 1994. No. S-93-014.

1. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
2. **Summary Judgment.** Summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. **Criminal Law: Limitations of Actions.** Chapter 29 of the Nebraska Revised Statutes applies only to criminal procedure, and therefore, the statute of limitations in Neb. Rev. Stat. § 29-110 (Cum. Supp. 1992) has no application to civil cases.
4. **Statutes: Damages: Liability: Penalties and Forfeitures.** A statute which imposes liability for actual damages and additional liability for the same act exacts a penalty.

Appeal from the District Court for Platte County: JOHN C. WHITEHEAD, Judge. Affirmed.

Thomas R. Zakrzewski for appellants.

Vard R. Johnson, of Broom, Johnson, Fahey & Clarkson, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ.

FAHRNBRUCH, J.

Plaintiffs, LaBenz Trucking, Inc. (LaBenz Trucking), Tracy Valley Service Center, Inc. (Tracy Valley), and Denny LaBenz, appeal from a summary judgment entered in favor of defendant, Richard A. Snyder.

Plaintiffs sued Snyder, alleging that he had maliciously and intentionally damaged plaintiffs under color of office as city engineer for the city of Humphrey.

We affirm the order of the district court for Platte County granting summary judgment in favor of Snyder and dismissing plaintiffs' petition.

STANDARD OF REVIEW

In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Barta v. Kindschuh, ante* p. 208, 518 N.W.2d 98 (1994). Summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Id.*

FACTS

Viewed in the light most favorable to plaintiffs, and giving plaintiffs the benefit of all reasonable inferences deducible from the evidence, the relevant facts of this case are as follows:

LaBenz Trucking and Tracy Valley are corporations organized under the laws of the State of Nebraska and have their principal places of business in Humphrey. Denny LaBenz is a resident of Humphrey and is president of both LaBenz Trucking and Tracy Valley. Snyder is a resident of Columbus and was employed at all times material to this case as the city engineer for Humphrey.

Plaintiffs allege that on May 20, 1991, under the pretext of acting in his official capacity as city engineer, Snyder sent a letter to the Nebraska Department of Environmental Control on behalf of the city of Humphrey, "falsely and maliciously accusing plaintiffs of discharging sewage directly onto the ground."

Plaintiffs also allege that on occasions after May 20, 1991, Snyder "made statements to plaintiff threatening to destroy plaintiffs' business and that plaintiffs would know what court was all about before the Nebraska Department of Environmental Control was through with plaintiffs."

On October 19, 1992, plaintiffs filed suit against Snyder pursuant to Neb. Rev. Stat. § 28-926 (Reissue 1989), which provides that any public servant who by color of his office willfully harms any person shall be answerable in treble damages. Section 28-926 further provides that "[o]ppression

under color of office is a Class II misdemeanor." Plaintiffs did not plead to recover multiple damages, and expressly waived that right.

Snyder did not answer, but moved for summary judgment on the basis that plaintiffs' cause of action was time barred by Neb. Rev. Stat. §§ 25-208 (Cum. Supp. 1992) and 20-211 (Reissue 1991). At the hearing on Snyder's summary judgment motion, Snyder entered into evidence his affidavit stating that "any and all communications, statements or other activities referred to by the Plaintiffs, either generally or specifically, in their Petition filed in this matter have occurred more than one year prior to the filing of the Petition herein." No controverting evidence was entered by plaintiffs. The trial court sustained Snyder's motion for summary judgment and dismissed plaintiffs' petition.

Plaintiffs timely appealed to the Nebraska Court of Appeals. The case was removed from the Court of Appeals to this court pursuant to our authority to regulate the caseloads of the appellate courts of this state.

ASSIGNMENT OF ERROR

Plaintiffs' sole assignment of error is that the trial court erred in holding that plaintiffs' cause of action against Snyder is barred by the 1-year statute of limitations of § 25-208.

ANALYSIS

Plaintiffs argue that their cause of action is not barred by § 25-208 because (1) § 28-926 provides that oppression under color of office is a misdemeanor, and therefore, the 18-month statute of limitations in Neb. Rev. Stat. § 29-110 (Cum. Supp. 1992) controls; (2) plaintiffs have elected not to sue for treble damages, making § 28-926 remedial rather than penal, and therefore, § 25-208 does not apply; and (3) plaintiffs may elect the common-law remedy of compensatory damages without regard to § 28-926. We begin by addressing the issue of which statute of limitations controls, as raised in plaintiffs' first two arguments, which are interrelated.

Plaintiffs argue that their cause of action is not time barred by § 25-208 because that statute applies to actions which are *penal* in nature, and plaintiffs have waived treble damages, thus

making their action *remedial* in nature. Plaintiffs urge that their cause of action is instead subject to the 18-month statute of limitations for misdemeanors prescribed by § 29-110, because § 28-926 classifies oppression under color of office as a Class II misdemeanor.

Plaintiffs' argument that their case is subject to the statute of limitations in § 29-110 is meritless. We have held that chapter 29 of the Nebraska Revised Statutes applies only to criminal procedure, and therefore, the statute of limitations in § 29-110 has no application to civil cases. See *In re Interest of Hollenbeck*, 212 Neb. 253, 322 N.W.2d 635 (1982). Cf. *State, ex rel. Wright, v. Barlow*, 132 Neb. 166, 271 N.W. 282 (1937) (holding that the statute of limitations in § 29-110 did not apply to criminal contempt, and explaining that an act denounced by statute as a crime could constitute contempt of court even if the offender could be prosecuted under a criminal statute). The plaintiffs have brought a civil action against Snyder, and thus, § 29-110 has no application to plaintiffs' case.

Next we determine whether § 25-208 is applicable to plaintiffs' cause of action. Section 25-208 states:

> The following actions can only be brought within the periods stated in this section: Within one year, an action for libel, slander, assault and battery, false imprisonment, or malicious prosecution or *an action upon a statute for a penalty* or forfeiture, but if the statute giving such action prescribes a different limitation, the action may be brought within the period so limited . . . .

(Emphasis supplied.)

If plaintiffs' lawsuit is an action upon a statute for a penalty, the 1-year statute of limitations in § 25-208 is applicable and will bar plaintiffs' action.

Plaintiffs contend that § 28-926 is remedial *as to them*, and not penal, because even though the statute provides for treble damages, plaintiffs have waived treble damages and have sought only actual damages.

A statute which imposes liability for actual damages and additional liability for the same act exacts a penalty. *Abel v. Conover*, 170 Neb. 926, 104 N.W.2d 684 (1960); *Distinctive Printing & Packaging Co. v. Cox*, 232 Neb. 846, 443 N.W.2d

566 (1989). Plaintiffs cite no authority, nor has our research discovered any, to support the proposition that a party may convert a purely penal statute into a remedial one simply at the election of the party.

Plaintiffs attempt to support their argument by relying on *Department of Banking v. McMullen*, 134 Neb. 338, 278 N.W. 551 (1938), in which we held that a statute may be penal in part and remedial in part. However, *McMullen* is easily distinguished from the present case. In *McMullen*, the statute in question provided separate types of damages for separate violations of the banking law at issue. This is not true of § 28-926, which provides only that a public servant who violates the statute "shall be answerable to the party so injured, deceived, or harmed or oppressed *in treble damages*." (Emphasis supplied.) There is no other type or measure of damages provided to an aggrieved party bringing an action against a civil servant pursuant to § 28-926.

This is consistent with our holding in *Sunderland Bros. Co. v. Chicago, B. & Q. R. Co.*, 104 Neb. 319, 177 N.W. 156 (1920), *reh'g denied* 104 Neb. 322, 179 N.W. 546. In *Sunderland Bros. Co.*, this court struck down a statute as unconstitutionally exacting a penalty, and stated that "[t]he question of election . . . is not in the case before us, since, *by the wording of the statute in question, no election is provided* . . . ." (Emphasis supplied.) 104 Neb. at 327, 179 N.W. at 548.

Likewise, the plain wording of § 28-926 does not provide for any election of damages by a plaintiff. Because the Legislature has not seen fit, in § 28-926, to provide for an election between actual and treble damages, this court may not construe the statute to so provide.

We therefore hold that § 28-926 is penal in nature and that plaintiffs' action is one "upon a statute for a penalty." As such, plaintiffs' action is subject to the 1-year statute of limitations of § 25-208.

Finally, we turn to plaintiffs' argument that they may elect a common-law remedy for compensatory damages. Assuming that plaintiffs could elect such a remedy, their allegations that Snyder falsely and maliciously accused plaintiffs of wrongdoing amounts to an action for defamation.

Nebraska recognizes common-law actions for libel and slander, both of which are subject to the same 1-year statute of limitations as an action on a statute for a penalty. See § 25-208. Nebraska also recognizes a statutory cause of action for invasion of privacy, which is likewise subject to a 1-year statute of limitations. See Neb. Rev. Stat. §§ 20-204 (Reissue 1991) and 20-211. Therefore, any common-law remedy elected by plaintiffs is also barred.

Because it is uncontroverted that all events upon which plaintiffs rely in their petition occurred more than 1 year prior to the filing of plaintiffs' petition, and because plaintiffs' action is time barred by the applicable statutes of limitations, Snyder is entitled to judgment as a matter of law. The district court correctly granted judgment for Snyder and dismissed plaintiffs' petition with prejudice.

CONCLUSION

The district court correctly found that plaintiffs' cause of action was filed out of time. We affirm the order of the district court granting summary judgment to defendant and dismissing plaintiffs' petition.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CRAIG T. GRIMES, APPELLANT.
519 N.W.2d 507

Filed July 22, 1994. No. S-93-668.

1. **Motions to Suppress: Appeal and Error.** A trial court's ruling on a motion to suppress is to be upheld on appeal unless its findings of fact are clearly erroneous.
2. _____: _____. In determining whether a trial court's findings on a motion to suppress are clearly erroneous, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses.
3. **Search Warrants: Probable Cause.** A search warrant, to be valid, must be supported by an affidavit establishing probable cause, or reasonable suspicion founded upon articulable facts.

4. _____: _____. In evaluating probable cause for the issuance of a search warrant, the magistrate must make a practical, commonsense decision whether, given the totality of the circumstances set forth in the affidavit before him, including the veracity of and basis of knowledge of the persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.
5. **Search Warrants: Probable Cause: Appeal and Error.** The duty of the reviewing court is to ensure that the magistrate issuing a search warrant had a substantial basis for determining that probable cause existed.
6. **Search Warrants: Affidavits.** When a search warrant is obtained on the strength of an informant's information, the affidavit in support of the issuance of the search warrant must (1) set forth facts demonstrating the basis of the informant's knowledge of criminal activity and (2) establish the informant's credibility, or the informant's credibility must be established in the affidavit through a police officer's independent investigation.
7. _____: _____. An affidavit in support of the issuance of a search warrant must affirmatively set forth the circumstances from which the status of the informant can reasonably be inferred.
8. _____: _____. Among the ways in which the reliability of an informant may be established are by showing in the affidavit to obtain a search warrant that (1) the informant has given reliable information to police officers in the past, (2) the informant is a citizen informant, (3) the informant has made a statement that is against his or her penal interest, and (4) a police officer's independent investigation establishes the informant's reliability or the reliability of the information the informant has given.
9. **Criminal Law: Search Warrants: Probable Cause.** Admissions of crime, like admissions against proprietary interests, carry their own indicia of credibility—sufficient at least to support a finding of probable cause to search.
10. **Search Warrants: Affidavits: Appeal and Error.** An appellate court is restricted to consideration of the information and circumstances contained within the four corners of the affidavit underlying a search warrant.
11. **Search Warrants: Evidence.** Evidence which emerges after a search warrant is issued has no bearing on whether the warrant was validly issued.
12. **Criminal Law: Courts: Juvenile Courts: Jurisdiction.** In deciding whether to transfer proceedings to juvenile court, the court having jurisdiction over a pending criminal prosecution must carefully consider the criteria set forth in Neb. Rev. Stat. § 43-276 (Reissue 1988).
13. **Trial: Expert Witnesses.** The right of an indigent defendant to the appointment of an expert witness at State expense generally rests in the discretion of the trial court.
14. **Courts: Juvenile Courts: Jurisdiction.** The consideraton of the criteria listed in Neb. Rev Stat. § 43-276 (Reissue 1988) is a balancing test. A court need not decide all of these criteria against the juvenile before denying a motion to transfer.
15. **Homicide: Intent.** The essential elements in the crime of murder in the second degree are that the killing be done purposely and maliciously.
16. **Trial: Judges: Jury Instructions: Appeal and Error.** It is the duty of the trial

judge to instruct the jury on the pertinent law of the case, whether requested to do so or not, and an instruction or instructions which by the omission of certain elements have the effect of withdrawing from the jury an essential issue or element in the case are prejudicially erroneous.

17. **Criminal Law: Due Process: Statutes.** Due process requires that criminal statutes be clear and definite and that a crime and ascertainable standards of guilt be defined with sufficient definiteness to inform those subject to the statute what conduct will render them liable to punishment.
18. **Criminal Law: Due Process: Jury Instructions: Proof.** A jury instruction which shifts the burden of proof to a defendant on any essential element of a crime charged violates a defendant's due process right to a fair trial.
19. **Criminal Law: Indictments and Informations.** Generally, to charge the defendant with the commission of a criminal offense, an information or complaint must allege each statutorily essential element of the crime charged, expressed in the words of the statute or in language equivalent to the statutory terms defining the crime charged.
20. **Indictments and Informations.** The purpose of an information is to inform the accused, with reasonable certainty, of the charge being made against him in order that he may prepare his defense thereto and also so that he may be able to plead the judgment rendered thereon as a bar to later prosecution for the same offense.
21. **Indictments and Informations: Statutes.** If a statute does not set forth all the elements necessary to constitute the offense intended to be punished, an indictment simply following the words of the statute is not sufficient, and, in such a case, the indictment must allege with certainty all of the particular elements necessary to bring the case within the intent and meaning of the statute.

Appeal from the District Court for Douglas County: PAUL J. HICKMAN, Judge. Reversed and remanded for a new trial.

Julianne M. Dunn and Daniel J. Neppl for appellant.

Don Stenberg, Attorney General, and Mark D. Starr for appellee.

HASTINGS, C.J., WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ.

PER CURIAM.

Following a jury trial in the Douglas County District Court, Craig T. Grimes was convicted of second degree murder and use of a firearm to commit a felony for the September 7, 1992, shooting death of James P. Kirby. He appealed his convictions of murder in the second degree and use of a firearm to commit a felony to the Nebraska Court of Appeals. Under our authority to regulate the caseloads of the appellate courts of this state, we

removed the matter to this court. Grimes challenges the district court's rulings on a motion to suppress and on a motion for a psychological examination. He also contends that the district court abused its discretion in sentencing him. Finally, Grimes contends that the district court committed reversible error in instructing the jury. He asserts the trial court erred by failing to instruct the jury that malice is an element of the crime of second degree murder. We agree and, accordingly, reverse the judgment of the district court and remand this cause for a new trial.

BACKGROUND

Grimes was charged by information with second degree murder and use of a firearm to commit a felony for the September 7, 1992, shooting death of Kirby. Prior to trial, Grimes, then age 16, filed a motion to have his case transferred to the separate juvenile court. Additionally, asserting that an examination 18 months earlier revealed depression and an adjustment disorder, Grimes moved the court to order a psychological exam. The trial court denied both motions. Grimes also filed a motion to suppress the evidence obtained by police during a search of his home. This motion was also denied. Grimes was tried before a jury in the Douglas County District Court. He was convicted of both second degree murder and use of a firearm to commit a felony. Grimes was sentenced to life in prison for second degree murder and to a consecutive sentence of 6 to 10 years for use of a firearm in the commission of a felony.

ASSIGNMENTS OF ERROR

Restated, Grimes assigns that the trial court erred in (1) failing to grant his motion to suppress, (2) failing to grant his motion for a psychological examination, (3) failing to instruct the jury that malice was an element of second degree murder, and (4) in sentencing him to life in prison.

STANDARD OF REVIEW

A trial court's ruling on a motion to suppress is to be upheld on appeal unless its findings of fact are clearly erroneous. *State v. Dyer*, 245 Neb. 385, 513 N.W.2d 316 (1994). In determining whether a trial court's findings on a motion to suppress are

clearly erroneous, an appellate court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that it observed the witnesses. *Id.*

MOTION TO SUPPRESS

Grimes asserts that the trial court erred in failing to suppress the evidence police obtained during a search of his home. Grimes contends the evidence should have been suppressed, since it was obtained during an unlawful search. He argues that the search was unlawful because the affidavit in support of the request for a search warrant failed to demonstrate that the hearsay information contained therein came from a reliable source.

The affidavit executed by the police to obtain the search warrant states in pertinent part:

> [T]he following are the grounds for the issuance of a search warrant for said property and the reasons for the Affiant's belief, to-wit: (1) On Monday, September 7, 1992, at 1746 hours, cruiser officers with the Omaha Police Division responded to a disturbance/shooting radio call at 1702 North 32nd St., Omaha, NE.
>
> The victim of this shooting incident which took place on the fore-mentioned address, was identified as James P. Kirby, a white male, Date of Birth, 10-05-1965, who resided at 1702 North 32nd St., Omaha, NE.
>
> The victim, James P. Kirby, died shortly after the shooting incident as a result of sustaining a single gun shot wound to the chest area.
>
> (2) During the course of the follow-up investigation, a spent round was recovered from the sidewalk area in front of 1702 North 32nd St., Omaha, NE, where the victim, James P. Kirby, collapsed after being shot. A subsequent preliminary examination of the spent bullet indicated an approximate size of 44 caliber. Also during the course of the follow-up investigation, affiant officers, Jadlowksi, #991, and Comstock, #860, were actively involved in developing information from numerous witnesses which indicated a chrome plated 44 caliber, long barrelled

revolver was used in this homicide and possible identification of suspects involved.

(3) One of the named suspects was identified as Doss, Ronnie L. a black male, DOB-12/09/74, residing at 4223 Binney St., Omaha, NE, currently a student at Benson High School of Omaha, NE. Doss was located at Benson High School, Omaha, NE, and transported to 505 South 15th St. Room #413, Omaha Police Headquarters on September 9, 1992, at 1515 hours, and at that location was interviewed by affiant officers, Jadlowksi, #991, and Comstock, #860, and during this interview he stated that he personally observed the suspect as Grimes, Craig, a black male, DOB-09/05/66, residing at 3915 North 43rd St., Omaha, NE, discharge what he described as 44 caliber long barrelled revolver, silver in color, with dark wood grained grips, at victim, Kirby, James. After observing the firearm discharge, witness, Doss, stated he observed the victim, Kirby, James, fall to the ground.

(4) After observing Kirby fall to the ground, Doss stated that he and Grimes, Craig with other individuals ran to Doss's vehicle and left the area. After driving around for a period of time, for approximately 2 hours, Doss stated, that he dropped Grimes off at his residence located at 3915 North 43rd St., and at this time Grimes still had in his possession the afore-mentioned 44 caliber long-barrelled revolver, silver, with wood grain grips.

(5) During the interview with Doss, he stated to affiant officers, that he had observed Grimes, Craig in possession of the afore-mentioned weapon. And two or three of these times, he was observed in possession of the weapon at 3915 North 43rd St. where Grimes, Craig resides with his father Grimes, Arthur.

A search warrant, to be valid, must be supported by an affidavit establishing probable cause, or reasonable suspicion founded upon articulable facts. *State v. Morrison*, 243 Neb. 469, 500 N.W.2d 547 (1993). In evaluating probable cause for the issuance of a search warrant, the magistrate must make a practical, commonsense decision whether, given the totality of the circumstances set forth in the affidavit before him,

including the veracity of and basis of knowledge of the persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *State v. Garza*, 242 Neb. 573, 496 N.W.2d 448 (1993); *State v. Groves*, 239 Neb. 660, 477 N.W.2d 789 (1991). The duty of the reviewing court is to ensure that the issuing magistrate had a substantial basis for determining that probable cause existed. *Id.*

When a search warrant is obtained on the strength of an informant's information, the affidavit in support of the issuance of the search warrant must (1) set forth facts demonstrating the basis of the informant's knowledge of criminal activity and (2) establish the informant's credibility, or the informant's credibility must be established in the affidavit through a police officer's independent investigation. *State v. Utterback*, 240 Neb. 981, 485 N.W.2d 760 (1992). The affidavit must affirmatively set forth the circumstances from which the status of the informant can reasonably be inferred. *Id.*

Among the ways in which the reliability of an informant may be established are by showing in the affidavit to obtain a search warrant that (1) the informant has given reliable information to police officers in the past, (2) the informant is a citizen informant, (3) the informant has made a statement that is against his or her penal interest, and (4) a police officer's independent investigation establishes the informant's reliability or the reliability of the information the informant has given. *Id.*

Grimes concedes that Doss was an informant who made a statement against his own penal interest. However, Grimes argues that without independent corroboration, Doss' statements were not sufficiently reliable. In *State v. Sneed and Smith*, 231 Neb. 424, 436 N.W.2d 211 (1989), we addressed whether an affidavit for a search warrant containing admissions of criminal conduct established the reliability of the informant. In that case, a burglary suspect admitted to police his involvement in four burglaries. The suspect told police he had exchanged the stolen items for drugs at a particular residence. After interviewing the suspect, the investigating officer independently determined that one defendant resided at the given residence and had an extensive record for theft and

receiving stolen property. The officer also used burglary reports to identify the items to be searched for. We held that the affidavit containing the information compiled by the officer, including the burglary suspect's statements, was sufficient to establish probable cause.

Here, some of the statements made by the informant were also bolstered by information independently established by the police. The affidavit stated that the police recovered a slug at the scene of the shooting which was the approximate size of a .44-caliber slug. Also corroborative of Doss's statement was the affiant officer's statement that "numerous witnesses . . . indicated a chrome plated 44 caliber, long barrelled revolver was used in this homicide." Contrary to Grimes' contentions, the affidavit was supported by independent investigation which corroborates Doss' statements to deem them sufficiently reliable to support a search warrant.

Grimes also submits that Doss' statement against penal interest is not a sufficient indicia of reliability, since it was self-serving. Grimes contends that since Doss was also a suspect in Kirby's murder, Doss' statements were made for the purpose of exonerating himself. This issue was also previously addressed in *State v. Sneed and Smith, supra.* In support of our holding that an affidavit for a search warrant containing admissions of criminal conduct established the reliability of the informant, we quoted the following from *United States v. Harris*, 403 U.S. 573, 583-84, 91 S. Ct. 2075, 29 L. Ed. 2d 723 (1971):

> Admissions of crime, like admissions against proprietary interests, carry their own indicia of credibility—sufficient at least to support a finding of probable cause to search. That the informant may be paid or promised a "break" does not eliminate the residual risk and opprobrium of having admitted criminal conduct.

Despite Grimes' assertions to the contrary, a statement against penal interest, in and of itself, carries a sufficient indicia of reliability to support a finding of probable cause. *United States v. Harris, supra.*

Finally, with regard to the search warrant, Grimes contends that Doss' subsequent testimony at trial and in depositions

reveals that he was unreliable. What Doss' subsequent testimony revealed is irrelevant. An appellate court is restricted to consideration of the information and circumstances contained within the four corners of the underlying affidavit. *State v. Morrison*, 243 Neb. 469, 500 N.W.2d 547 (1993); *State v. Utterback, supra*. Evidence which emerges after the warrant is issued has no bearing on whether the warrant was validly issued. *Id.*.

We conclude that under the totality of the circumstances, the underlying affidavit established probable cause to search. The warrant was therefore proper, and the trial court did not err by refusing to suppress the evidence obtained during the search of Grimes' residence.

MOTION FOR PSYCHOLOGICAL EXAMINATION

Next, Grimes contends the trial court erred in denying his motion for a psychological examination. Grimes sought the examination to support his motion to transfer to juvenile court. Grimes alleged that the psychological examination was necessary for a determination of whether he was of a sufficient psychological, emotional, and mental makeup to be tried as an adult. In support of his motion for evaluation, Grimes alleged that a psychological evaluation performed 18 months earlier showed that he suffered from depression and an adjustment disorder. At a hearing on the motion to transfer, Grimes adduced evidence to that effect.

Grimes, however, has failed to demonstrate that the trial court had any legal right, let alone any legal obligation, to grant such a motion. He has cited no statutory or case law as authority for his position. He merely argues that the denial of the motion was an abuse of discretion.

Grimes is correct in asserting that the "sophistication," "maturity," and "emotional attitude" of a defendant are relevant considerations to the issue of whether the district court should waive jurisdiction in favor of the juvenile court. See Neb. Rev. Stat. § 43-276(6) (Reissue 1988). In deciding whether to transfer proceedings to juvenile court, the court having jurisdiction over a pending criminal prosecution must carefully consider the criteria set forth in § 43-276. *State v. Ice*, 244 Neb.

875, 509 N.W.2d 407 (1994). Section 43-276 requires that the court consider:

> (1) The type of treatment such juvenile would most likely be amenable to; (2) whether there is evidence that the alleged offense included violence or was committed in an aggressive and premeditated manner; (3) the motivation for the commission of the offense; (4) the age of the juvenile and the ages and circumstances of any others involved in the offense; (5) the previous history of the juvenile, including whether he or she had been convicted of any previous offenses or adjudicated in juvenile court, and, if so, whether such offenses were crimes against the person or relating to property, and other previous history of antisocial behavior, if any, including any patterns of physical violence; (6) the sophistication and maturity of the juvenile as determined by consideration of his or her home, school activities, emotional attitude and desire to be treated as an adult, pattern of living, and whether he or she has had previous contact with law enforcement agencies and courts and the nature thereof; (7) whether there are facilities particularly available to the juvenile court for treatment and rehabilitation of the juvenile; (8) whether the best interests of the juvenile and the security of the public may require that the juvenile continue in custody or under supervision for a period extending beyond his or her minority and, if so, the available alternatives best suited to this purpose; and (9) such other matters as the county attorney deems relevant to his or her decision.

See *State v. Doyle*, 237 Neb. 60, 464 N.W.2d 779 (1991).

However, the fact that evidence obtained from an updated evaluation of Grimes' condition may be relevant does not mean that an evaluation must be ordered. The right of an indigent defendant to the appointment of an expert witness at State expense generally rests in the discretion of the trial court. *State v. Lesiak*, 234 Neb. 163, 449 N.W.2d 550 (1989). See, also, *State v. Suggett*, 200 Neb. 693, 264 N.W.2d 876 (1978).

In the case at hand, we cannot say that denial of the motion for evaluation was an abuse of discretion. Although we do not

decide whether the trial court's ruling on the motion to transfer was proper, we note that the motion for evaluation was within the context of a motion to transfer to juvenile court. We review a trial court's ruling on a motion to transfer for an abuse of discretion. *State v. Ice, supra.* Moreover, the consideration of the criteria listed in § 43-276 is a balancing test. *Id.* A court need not decide all of these criteria against the juvenile before denying a motion to transfer. *Id.* Thus, although an updated evaluation may have revealed additional information on Grimes' psychological condition, it is unlikely that the additional information would have had enough weight to shift the balance toward transferring this case to juvenile court.

The specific findings contained in the trial court's order overruling Grimes' motion to transfer reveal that many factors militated against a transfer to juvenile court: the serious nature of the charged offense; the alleged violent circumstances under which the offense was alleged to have been committed; Grimes' record with the juvenile court; his admission of gang involvement; and, if the allegations proved true, the fact that such a criminal would pose a threat to society. The trial court's denial of the motion for evaluation is affirmed.

ABSENCE OF MALICE

The essential elements in the crime of murder in the second degree are that the killing be done purposely and maliciously. *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994); *State v. Franklin*, 241 Neb. 579, 489 N.W.2d 552 (1992); *State v. Dean*, 237 Neb. 65, 464 N.W.2d 782 (1991); *State v. Trevino*, 230 Neb. 494, 432 N.W.2d 503 (1988); *State v. Ettleman*, 229 Neb. 220, 425 N.W.2d 894 (1988); *State v. Moniz*, 224 Neb. 198, 397 N.W.2d 37 (1986); *State v. Rowe*, 214 Neb. 685, 335 N.W.2d 309 (1983). This has been the law in this state since 1983. *Id.* It has also long been the law of this state that it is the duty of the trial judge to instruct the jury on the pertinent law of the case, whether requested to do so or not, and an instruction or instructions which by the omission of certain elements have the effect of withdrawing from the jury an essential issue or element in the case are prejudicially erroneous. *State v. Breaker*, 178 Neb. 887, 136 N.W.2d 161 (1965).

In this case, the jury was not instructed that it needed to find that the killing was done maliciously. Therefore, Grimes is entitled to a reversal of his convictions and a new trial.

The State's argument that this court only recently, in *State v. Myers, supra*, added malice as an element of second degree murder, shows ignorance of, or the disregard for, 11 years of consistent holdings by this court. The suggestion that including malice as an element of second degree murder "transgresses important and well-established principles of law," supplemental brief for appellee at 3, itself transgresses important and well-established principles of law. As we pointed out in *Myers*, if malice were not an element of second degree murder, the homicide statutes would not make sense.

Additionally, defining second degree murder without malice would make the performance of many noncriminal acts illegal. For instance, a police officer who kills in the line of duty can be said to have caused the death of a person intentionally. Therefore, absent malice, Neb. Rev. Stat. § 28-304 (Reissue 1989), would be unconstitutionally vague and overbroad. See *State v. Saulsbury*, 243 Neb. 227, 498 N.W.2d 338 (1993) (due process requires that criminal statutes be clear and definite and that a crime and ascertainable standards of guilt be defined with sufficient definiteness to inform those subject to the statute what conduct will render them liable to punishment). The State contends that the "justification" statutes, Neb. Rev. Stat. §§ 28-1406 to 28-1416 (Reissue 1989), would save the second degree murder statute from being held unconstitutional. The State argues this would prevent a conviction for noncriminal conduct. However, this would require a police officer, for instance, who is accused of second degree murder for a death in the line of duty to use a justification statute to prove his innocence. This would unconstitutionally shift the burden of proof to the defendant. See *State v. Parks*, 245 Neb. 205, 511 N.W.2d 774 (1994) (a jury instruction which shifts the burden of proof to a defendant on any essential element of a crime charged violates a defendant's due process right to a fair trial). See, also, *Mullaney v. Wilbur*, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975) (jury instruction which shifts the burden of proof on a mental element of a crime to the

defendant violates due process). We in no way suggest that the "justification" statutes are invalid. If malice were not a statutory element of second degree murder and we were to require a defendant committing a "justified" act to adduce some evidence of lack of malice or "justification" in his defense, we would thereby violate that defendant's presumption of innocence. We continue to hold, as we have consistently for the past 11 years, that malice is an essential element of second degree murder.

THE INFORMATION

We also note that the information charging Grimes omitted malice. In pertinent part, the information charged that Grimes did "intentionally, but without premeditation, kill James P. Kirby."

Generally, to charge the defendant with the commission of a criminal offense, an information or complaint must allege each statutorily essential element of the crime charged, expressed in the words of the statute or in language equivalent to the statutory terms defining the crime charged. *State v. Schaaf*, 234 Neb. 144, 449 N.W.2d 762 (1989). See, also, *State v. Bowen*, 244 Neb. 204, 505 N.W.2d 682 (1993) (where an information alleges the commission of a crime using the language of the statute defining that crime or terms equivalent to such statutory definition, the charge is sufficient). However, where as in second degree murder the express language of the statute does not make the elements of the crime clear, the express language of the statute is insufficient. The purpose of an information is to inform the accused, with reasonable certainty, of the charge being made against him in order that he may prepare his defense thereto and also so that he may be able to plead the judgment rendered thereon as a bar to later prosecution for the same offense. *State v. Laymon*, 239 Neb. 80, 474 N.W.2d 458 (1991). It is this purpose which is paramount.

The general rule has never been applied to an information charging the accused with second degree murder under the current statute, § 28-304. Since a charge under the express language of the statute would omit an essential element of the crime, the general rule is not applicable. See *State v. Oman*, 265

Minn. 277, 121 N.W.2d 616 (1963) (if a statute does not set forth all the elements necessary to constitute the offense intended to be punished, an indictment simply following the words of the statute is not sufficient, and, in such a case, the indictment must allege with certainty all of the particular elements necessary to bring the case within the intent and meaning of the statute). See, also, *Ex parte Allred*, 393 So. 2d 1030 (Ala. 1981) (indictment is sufficient which substantially follows the language of the statute, provided the statute prescribes with definiteness the constituents of the offense); *Stevens v. State*, 817 S.W.2d 800 (Tex. Crim. App. 1991) (although an indictment which tracks the language of the statute is ordinarily sufficient, it is not sufficient where more particularity is necessary to meet the requirement of notice to the accused). To be sufficient, an information charging second degree murder must allege that the accused killed purposely and maliciously.

EXCESSIVE SENTENCE

Finally, Grimes contends that his sentence of life in prison is excessive and constitutes an abuse of judicial discretion. We need not address this issue in light of our granting a new trial.

CONCLUSION

The trial court's failure to instruct the jury that malice is an element of second degree murder was prejudicial error. Grimes' convictions are reversed, and the cause is remanded to the district court for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

BOSLAUGH, J., participating on briefs.

WRIGHT, J., dissenting.

I respectfully dissent from the majority's decision because it relies upon *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994). I disagree with *Myers*, which held that malice is a required element of second degree murder. Therefore, I write to explain my reasons for disagreeing with the holdings in the case at bar, in *Myers*, and in the cases on which *Myers* relies for the proposition that malice is an element of second degree murder.

In Nebraska, all crimes are statutory. *State v. Schneckloth, Koger, and Heathman*, 210 Neb. 144, 313 N.W.2d 438 (1981).

Prior to the adoption of the present criminal code in 1977, murder in the second degree was described as "purposely and maliciously, but without deliberation and premeditation, kill[ing] another." Neb. Rev. Stat. § 28-402 (Reissue 1975). The present code, as adopted in 1977, states that "[a] person commits murder in the second degree if he causes the death of a person intentionally, but without premeditation." Neb. Rev. Stat. § 28-304 (Reissue 1989).

In *Myers*, this court held that the trial court had plainly erred by failing to include malice as an element within the jury instruction on second degree murder, even though the defendant had raised no objection to the instruction. To reach this holding, the court relied on a series of cases which have added malice as an element of second degree murder. The court first relied upon *State v. Rowe*, 214 Neb. 685, 335 N.W.2d 309 (1983), which held that the essential elements of the crime of murder in the second degree were that the killing be done purposely and maliciously. In turn, *Rowe* relied upon *State v. Clermont*, 204 Neb. 611, 284 N.W.2d 412 (1979), which also stated that the essential elements for the crime of murder in the second degree were that the killing be done purposely and maliciously. In *Clermont*, the court relied upon *State v. Johnson*, 200 Neb. 760, 266 N.W.2d 193 (1978), which included malice as an element of the crime. However, at the time *Johnson* was decided, second degree murder was statutorily defined as "purposely and maliciously, but without deliberation and premeditation, kill[ing] another." § 28-402 (Reissue 1975).

The Legislature subsequently amended § 28-402 and *purposely* omitted malice from the elements of second degree murder. In explaining the revisions to the criminal code in 1977, the Judiciary Committee's summary of L.B. 38 stated:

> Section 19 is comparable to Section 28-402 or second degree murder. It differs from the present section, which requires the killing to be purposely and maliciously, whereas the new code requires that the cause of death of a person need only be done intentionally. The penalty under existing law and this section is the same, i.e., 10 years to life imprisonment.

Summary of Contents, L.B. 38, Judiciary Committee, 85th

Leg., 1st Sess. 3 (Jan. 24-26, 1977). Section 19 of L.B. 38 was codified as § 28-304, which became effective January 1, 1979. See 1978 Neb. Laws, L.B. 748, § 54.

The subsequent cases in which this court has relied upon *Johnson* and *Clermont* have added the element of malice to second degree murder, although malice was specifically omitted from the criminal code when it was revised. In my opinion, malice has not been an essential element of the crime of murder in the second degree since January 1, 1979.

Rowe was decided June 17, 1983. Because the murder for which Rowe was charged and ultimately convicted occurred May 1, 1980, Rowe was charged under § 28-304(1) for "caus[ing] the death of a person intentionally, but without premeditation." Although the crime occurred after the effective date of the new statute, this court, relying on *Clermont*, held that the essential elements of the crime of murder in the second degree were that the killing be done purposely and maliciously. The Legislature had purposely omitted malice as an element of the crime, and *Rowe*, in my opinion, incorrectly included "maliciously" as an element of second degree murder.

State v. Myers, 244 Neb. 905, 510 N.W.2d 58 (1994), stated that this court has continued to require malice as an element of second degree murder even though malice is not specified by statute. The court concluded that by omitting the element of malice from the instruction on second degree murder, the instruction, in effect, became one for the crime of intentional manslaughter as defined by *State v. Pettit*, 233 Neb. 436, 445 N.W.2d 890 (1989). This conclusion is now eroded by the fact that we have since overruled the holding in *Pettit* that "manslaughter is an intentional killing of another under Nebraska law." *State v. Jones*, 245 Neb. 821, 832, 515 N.W.2d 654, 660 (1994). We stated in *Jones*, "According to *Pettit*, the only element that distinguishes manslaughter upon a sudden quarrel and second degree murder is the element of the sudden quarrel, since both killings are intentional." 245 Neb. at 829, 515 N.W.2d at 658. "Since our statutes define manslaughter as a killing without malice, there is no requirement of an intention to kill in committing manslaughter. The distinction between second degree murder and manslaughter upon a sudden quarrel

is the presence or absence of an intention to kill." *Jones*, 245 Neb. at 830, 515 N.W.2d at 659.

Therefore, what distinguishes second degree murder from manslaughter is the element of intent. In my opinion, malice is therefore not an element of either manslaughter or second degree murder.

In *State v. Suhr*, 207 Neb. 553, 300 N.W.2d 25 (1980), we stated that the Legislature, in enacting a statute, is presumed to have known the preexisting law. The court must conclude that in enacting an amendatory statute, the Legislature intentionally changed the language for the purpose of effecting a change in the law itself. With the amendment of the statute defining second degree murder, there is no presumption. The Judiciary Committee stated that it was changing the law by deleting the terms "purposely" and "maliciously" and requiring that the cause of death of a person need only be done intentionally.

I disagree with the majority's statement that malice has consistently been held to be an element of second degree murder in this state since *State v. Rowe*, 214 Neb. 685, 335 N.W.2d 309 (1983). Where a statute has been judicially construed and that construction has not evoked amendment, it will be presumed that the Legislature has acquiesced in the court's determination of its intent. *Erspamer Advertising Co. v. Dept. of Labor*, 214 Neb. 68, 333 N.W.2d 646 (1983). This rule applies where a statute is ambiguous. Where the language of a statute is plain and unambiguous, no interpretation is needed, and a court is without authority to change such language. *State v. Palmer*, 215 Neb. 273, 338 N.W.2d 281 (1983), *cert. denied* 484 U.S. 872, 108 S. Ct. 206, 98 L. Ed. 2d 157 (1987). The language of the second degree murder statute is plain—malice is not an essential element.

As recently as *State v. Cave*, 240 Neb. 783, 484 N.W.2d 458 (1992), malice was not described as an essential element of second degree murder. The court stated:

> Under Nebraska law, second degree murder is defined as causing the death of another intentionally, but without premeditation. § 28-304(1). . . . In order to convict a person of second degree murder, the State is required to prove all *three* elements—*the death, the intent to kill, and*

causation—beyond a reasonable doubt.

(Emphasis supplied.) *Cave*, 240 Neb. at 789, 484 N.W.2d at 464.

In *Cave*, the defendant was charged with first degree murder, attempted first degree murder, and two counts of use of a firearm in the commission of a felony. Following a bench trial, the court found the defendant guilty of both counts of use of a firearm in the commission of a felony and guilty of the lesser-included offenses of second degree murder and attempted second degree murder. In affirming the convictions, this court did not describe malice as an element of second degree murder.

This court, in rejecting Cave's arguments, relied upon *Patterson v. New York*, 432 U.S. 197, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977). Patterson shot and killed his estranged wife's former fiance after finding them together. He was charged with second degree murder. In New York, there were two elements of second degree murder: " 'intent to cause the death of another person' " and " 'caus[ing] the death of such person or of a third person.' " *Patterson*, 432 U.S. at 198. Malice aforethought was not an element of the crime. *Id.* In *Patterson*, the crime of second degree murder had been rewritten as part of a recent revision of the state's criminal code. The second degree murder statute in New York is similar to Nebraska's statute, and malice is not an element of the crime in New York.

The trial court instructed the jury that if it found beyond a reasonable doubt that Patterson had intentionally killed the victim, but that Patterson proved by a preponderance of the evidence that he had done so under the influence of extreme emotional disturbance, it must find him guilty of manslaughter rather than murder. Manslaughter was defined as the intentional killing of another " 'under circumstances which do not constitute murder because [the defendant] acts under the influence of extreme emotional disturbance.' " *Patterson*, 432 U.S. at 199. The jury found Patterson guilty of murder. On appeal to the U.S. Supreme Court, Patterson argued that the New York murder statute was unconstitutional. The U.S. Supreme Court rejected this argument, stating:

> We cannot conclude that Patterson's conviction under

> the New York law deprived him of due process of law. The crime of murder is defined by the statute . . . as causing the death of another person with intent to do so. The death, the intent to kill, and causation are the facts that the State is required to prove beyond a reasonable doubt if a person is to be convicted of murder. No further facts are either presumed or inferred in order to constitute the crime. . . .
>
> . . . It seems to us that the State satisfied the mandate of [*In re*] *Winship*[, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970),] that it prove beyond a reasonable doubt "every fact necessary to constitute the crime with which [Patterson was] charged."

Patterson, 432 U.S. at 205-06. The U.S. Supreme Court declined to adopt as a constitutional imperative that a state must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of the accused. The Court concluded that the New York Legislature's decision to impose upon a defendant the burden of proving additional circumstances which lessen his culpability did not violate due process.

In *State v. Cave*, 240 Neb. 783, 789-90, 484 N.W.2d 458, 464 (1992), the court stated:

> In order to convict a person of second degree murder, the State is required to prove all three elements—the death, the intent to kill, and causation—beyond a reasonable doubt. None of the elements is presumed upon proof of the others, nor is any element presumed in the absence of proof by the defendant of the converse of that element. As in New York, the fact that a homicide occurs "upon a sudden quarrel" is an additional circumstance which serves to mitigate an intentional killing. [Citations omitted.]
>
> It is clear that whether a state's homicide laws violate due process depends a great deal upon the manner in which a state defines the crime charged. [Citations omitted.] Given the similarity between the second degree murder and manslaughter statutes of this state and those of New York, it is by no means clear that in a prosecution for second degree murder, the burden is on the State to

> prove the absence of a sudden quarrel beyond a reasonable doubt. We do not decide the question, however, because even assuming the State carried such a burden, the evidence is sufficient to sustain the convictions in this case.

Cave is significant for two reasons. First, it shows that this court has not *consistently* held that malice is an element of second degree murder. *Cave* held that the death, the intent to kill, and causation are the three elements required to convict a person of second degree murder. See, also, *Patterson v. New York*, 432 U.S. 197, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977). Second, *Cave* cited *Patterson*, which reinforces the fact that Nebraska's second degree murder statute, § 28-304, does not violate due process if malice is not an element of the crime. New York's second degree murder statute is similar to Nebraska's, and malice is not included in the language of either state's statute.

The New York statute which placed upon Patterson the burden of proving by a preponderance of the evidence the affirmative defense of acting under the influence of extreme emotional distress in order to reduce the crime to manslaughter did not deprive Patterson of due process. I believe *Patterson* addresses the concern expressed by the majority in the present case that defining second degree murder without malice would make illegal the performance of many noncriminal acts, e.g., a police officer who kills in the line of duty can be said to have caused the death of a person intentionally.

The majority asserts that requiring a police officer who is charged with second degree murder for causing a death in the line of duty to use as a defense the "justification statutes," Neb. Rev. Stat. §§ 28-1406 to 28-1416 (Reissue 1989), would unconstitutionally shift the burden of proof to the police officer. I disagree. First, the burden of proving circumstances which are an affirmative defense or which justify or lessen culpability is not the issue before us in this case. Second, the justification statutes serve as affirmative defenses to a killing. An affirmative defense does not serve to negate any facts of the crime which the State must prove, i.e., intending to cause the death of another, but without premeditation. The elements to

be proven remain the death, the intent to kill, and causation. *State v. Cave, supra.* "Long before *Winship*, the universal rule in this country was that the prosecution must prove guilt beyond a reasonable doubt. At the same time, the long-accepted rule was that it was constitutionally permissible to provide that various affirmative defenses were to be proved by the defendant." *Patterson*, 432 U.S. at 211. The majority in the present case expressly states that it in no manner suggests that the justification statutes are invalid.

The majority suggests that absent malice, § 28-304 would be unconstitutionally vague and overbroad because due process requires that criminal statutes be clear and definite and that ascertainable standards of guilt be defined with sufficient definiteness to inform those subject to the statutes what conduct will render them liable to punishment. The majority states that if malice is not an element of second degree murder, the homicide statutes do not make sense. I disagree. In *Patterson*, the U.S. Supreme Court concluded that Patterson's conviction under New York law did not deprive him of due process of law. No facts beyond the death, intent, and causation are either presumed or inferred in order to constitute a murder. *Patterson v. New York, supra.*

Regardless of the number of times this court has relied upon *State v. Rowe*, 214 Neb. 685, 335 N.W.2d 309 (1983), we cannot legislate by judicial fiat that malice is an essential element of second degree murder. We simply do not have the power to do so. See Neb. Const. art. II, § 1. The Legislature deliberately removed malice from the second degree murder statute when the criminal code was revised, and malice is not an essential element of the crime until the Legislature says that it is.

In the case at bar, this court also holds that the information must contain the element of malice or the charge is insufficient. I disagree. Where the information alleges the commission of a crime using the language of the statute defining that crime, the charge is sufficient. *State v. Bowen*, 244 Neb. 204, 505 N.W.2d 682 (1993). The majority points out that the purpose of an information is to inform the accused, with reasonable certainty, of the charge being made against him in order that he may prepare his defense and also be able to plead that the judgment

rendered thereon acts as a bar to later prosecution for the same offense. See *State v. Laymon*, 239 Neb. 80, 474 N.W.2d 458 (1991).

I fail to see how the absence of the word "maliciously" causes the information to be insufficient to comport with due process. Was Grimes denied procedural due process because the information did not say he "maliciously" caused the death of James P. Kirby? Grimes was charged by information as follows: "[O]n or about the 7th day of September, 1992, CRAIG T. GRIMES late of the county of Douglas and State of Nebraska, then and there being, did then and there intentionally, but without premeditation, kill James P. Kirby." The statutory elements of the crime have been described in the information. The State complied with procedural due process by charging Grimes in the language of the statute.

We have held that Nebraska's criminal procedure does not require a comprehensive and particularized factual description of elements of the offense charged in the information or complaint against a defendant. Using the language of the statute defining that crime or terms equivalent to such statutory definition is sufficient. *State v. Schaaf*, 234 Neb. 144, 449 N.W.2d 762 (1989).

The majority requires malice as an element of second degree murder despite the fact that the Legislature expressly removed the word "maliciously" from the second degree murder statute by amendment in 1977. Placing malice back into the statute is judicial legislation in violation of article II, § 1, of the Nebraska Constitution.

The information in the case at bar charges the elements necessary to constitute the offense intended to be punished. Since malice is not an element of second degree murder as defined by § 28-304, it was not prejudicial error for the trial court to fail to instruct the jury that malice was an element of second degree murder. Malice is not an element of the crime for which Grimes was charged, and I would affirm the conviction and sentence.

LINDSAY MANUFACTURING COMPANY, A CORPORATION, APPELLANT AND CROSS-APPELLEE, V. UNIVERSAL SURETY COMPANY, A CORPORATION, APPELLEE AND CROSS-APPELLANT. LINDSAY MANUFACTURING COMPANY, A CORPORATION, APPELLANT AND CROSS-APPELLEE, V. BRUCE GILMORE & ASSOCIATES, INC., APPELLEE AND CROSS-APPELLEE, AND CHRISTIANSEN CONSTRUCTION COMPANY, A CORPORATION, AND LAYNE-WESTERN COMPANY, INC., APPELLEES AND CROSS-APPELLANTS.

519 N.W.2d 530

Filed July 29, 1994. Nos. S-91-703, S-91-704.

1. **Summary Judgment: Appeal and Error.** In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
2. **Summary Judgment.** Summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. **Summary Judgment: Proof.** A party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law if the evidence presented for summary judgment remains uncontroverted. After the moving party has shown facts entitling it to a judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents judgment as a matter of law for the moving party.
4. **Directed Verdict: Appeal and Error.** With regard to the overruling of a motion for directed verdict made at the close of all the evidence, appellate review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can only draw but one conclusion from the evidence, where an issue should be decided as a matter of law.
5. **Directed Verdict.** A trial court should direct a verdict as a matter of law only when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom.
6. _____. The party against whom the verdict is directed is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which can reasonably be drawn from the evidence. If there is any evidence which will sustain a finding for the party against whom the motion is made, the case may not be decided as a matter of law.
7. **Judgments: Appeal and Error.** As to questions of law, an appellate court has an obligation to reach a conclusion independent from a trial court's conclusion in a

judgment under review.

8. **Limitations of Actions: Appeal and Error.** The point at which a statute of limitations begins to run must be determined from the facts of each case, and the decision of the district court on the issue of the statute of limitations normally will not be set aside by an appellate court unless clearly wrong.
9. **Limitations of Actions.** Neb. Rev. Stat. § 25-222 (Reissue 1989) contains the limitations period applicable to an engineer rendering professional services.
10. **Limitations of Actions: Negligence.** Under the terms of Neb. Rev. Stat. § 25-222 (Reissue 1989), if an action is not to be considered time barred, the plaintiff must either file within 2 years of an alleged act or omission or show that its action falls within the exceptions of this section as to its discovery of the defendant's alleged negligence.
11. _____: _____. A cause of action accrues for negligence in professional services when the alleged act or omission in rendering or failure to render professional services takes place.
12. _____: _____. The continuous representation rule, which tolls the running of the statute of limitations, is inapplicable where the claimant discovers the alleged negligence prior to the termination of the professional relationship.
13. **Limitations of Actions: Words and Phrases.** "Discovery," in the context of statutes of limitations, refers to the fact that one knows of the existence of an injury and not that he has a legal right to seek redress.
14. **Limitations of Actions.** In the context of statutes of limitations, it is not necessary that a plaintiff have knowledge of the exact nature or source of the problem, but only that a problem existed.
15. **Limitations of Actions: Negligence.** The discovery exception to the statute of limitations is inapplicable if facts are discovered that constitute the basis of a cause of action within 2 years from the alleged act of negligence.
16. **Construction Contracts: Contractors and Subcontractors: Liability.** Where a contractor makes an absolute and unqualified contract to construct a building or perform a given undertaking, it is the general, and perhaps universal, rule that he assumes the risks attending the performance of the contract and must repair and make good any injury or defect which occurs or develops before the completed work has been delivered to the other party. But where he makes a contract to perform a given undertaking in accordance with prescribed plans and specifications, this rule does not apply. Under such a contract, he is not permitted to vary from the prescribed plans and specifications even if he deems them improper and insufficient; and therefore, he cannot be held to guarantee that work performed as required by them will be free from defects, withstand the action of the elements, or accomplish the purpose intended. Where the contract specifies what he is to do and the manner and method of doing it, and he does the work specified in the manner specified, his engagement is fulfilled, and he remains liable only for defects resulting from improper workmanship or other fault on his part.
17. **Construction Contracts: Acceptance of Work: Waiver.** An express or implied acceptance of work as in compliance with a building contract operates as a waiver of defective performance. However, this rule is inapplicable where the

acceptance was under protest or induced by fraud, or where the defects were latent and unknown to the owner.

18. **Negligence.** The question of whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation.
19. _____. For actionable negligence to exist, there must be a legal duty on the part of the defendant to protect the plaintiff from injury, a failure to discharge that duty, and damage proximately resulting from the undischarged duty.
20. **Negligence: Words and Phrases.** "Duty" is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff, and in negligence cases, the duty is always the same—to conform to the legal standard of reasonable conduct in light of the apparent risk.
21. _____: _____. A duty, in negligence cases, may be defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.
22. **Contractors and Subcontractors.** In the absence of a binding agreement, express or implied, there is no privity of contract between a subcontractor and a landowner who employs the general contractor who hired the subcontractor.
23. **Construction Contracts: Parties: Negligence.** One not a party to a construction contract cannot, for injuries received after the acceptance of the completed work by the contractee, maintain an action in tort for the negligent performance of the contract.
24. **Contractors and Subcontractors.** An independent contractor owes no duty to third persons to judge the plans, specifications, or instructions which he has merely contracted to follow unless they are so obviously dangerous that no competent contractor would follow them.

Appeal from the District Court for Platte County: JOHN C. WHITEHEAD, Judge. Affirmed.

Ronald F. Krause and Michael K. Huffer, of Cassem, Tierney, Adams, Gotch & Douglas, for appellant.

Thomas J. Walsh, Sr., of Walsh, Fullenkamp & Doyle, for appellees Universal Surety Co. and Christiansen Construction Co.

Larry E. Welch and Christopher J. Tjaden, of Gross & Welch, P.C., for appellee Bruce Gilmore & Associates, Inc.

Waldine H. Olson and K.C. Engdahl, of Schmid, Mooney & Frederick, P.C., for appellee Layne-Western Co.

HASTINGS, C.J., BOSLAUGH, CAPORALE, FAHRNBRUCH, and LANPHIER, JJ., and GRANT, J., Retired.

LANPHIER, J.

Lindsay Manufacturing Company (Lindsay) appeals the

judgment of the district court for Platte County following a jury trial. Lindsay sought to recover costs incurred by it in remediating contamination of an aquifer underlying Lindsay's manufacturing plant. Lindsay claimed the contamination resulted from the improper construction of a new acid waste treatment facility (facility). Each defendant received judgment in its favor. Causes of action against Bruce Gilmore & Associates, Inc. (Gilmore), the engineering firm hired by Lindsay to design and oversee the construction of the facility, were dismissed by the district court as time barred by the statute of limitations. Although Lindsay asserted multiple causes of action against Christiansen Construction Company (Christiansen), the contractor hired by Lindsay to build the facility, the only action to reach the jury was breach of contract. Likewise, the only action to survive against Layne-Western Company, Inc. (Layne-Western), the subcontractor who dug the monitoring wells which are the subject of this litigation, was an action for negligence. The district court properly determined that the actions against Gilmore were time barred. Although the district court erred in failing to grant Christiansen's and Layne-Western's motions for directed verdict at the close of all evidence, the judgment of the district court rendered in favor of Christiansen and Layne-Western was proper. The liability of Universal Surety Company, the surety for Christiansen, is dependent upon the liability of Christiansen. We, therefore, affirm.

BACKGROUND

Lindsay manufactures galvanized center-pivot irrigation equipment. As a part of the galvanization process, components are cleaned in a sulfuric acid solution. When the solution loses its effectiveness it is called spent pickle liquor (SPL). Lindsay disposed of the SPL, a hazardous waste, by draining it into an unlined earthen lagoon. After this practice became illegal, Lindsay sought to construct a new disposal facility.

Lindsay retained and contracted with Gilmore in 1982 to provide design and engineering services and to prepare the plans, specifications, and contract documents for the design and construction of the new facility. Gilmore designed the new

facility and prepared plans and specifications which were submitted to and approved by the Nebraska Department of Environmental Control.

On December 6, 1982, Lindsay entered into a contract with Christiansen to construct the facility using the plans and specifications prepared by Gilmore. The plans called for the installation of two lined reservoirs, or impoundments, and four monitoring wells.

The monitoring wells were required to detect leakage from the new SPL impoundments. The monitoring wells were originally designed to be 110 feet deep, but later the depth was changed. The borehole was to have a 10-inch diameter. After the borehole was dug, PVC pipe 4 inches in diameter was to be inserted into the middle of the hole. All but the top 3 feet of the space in between the pipe and the wall of the hole, referred to as the "annular space," was to be filled with road gravel. The last 3 feet of the annular space was to be filled with bentonite clay.

Christiansen orally subcontracted with Layne-Western to do the actual digging and installation of the monitoring wells. Layne-Western dug and installed the monitoring wells during the period of December 15 to 21, 1982.

Prior to the drilling of the wells, the aquifer was tested for contamination, but none was detected. The wells were drilled between December 15 and 21. On December 16, the aquifer was tested again and found to be contaminated. Gilmore alleges that on January 1, 1983, all of its work with the monitoring wells was complete. On September 25, 1984, Lindsay was informed that deterioration of the aquifer was accelerated by the introduction of the wells. On July 15, 1985, Gilmore certified that the entire construction project was complete. Lindsay contends that it was not until June 12, 1986, that it was informed that contamination was due solely to the wells. Lindsay filed its initial petition on December 11, 1986.

Most of the evidence adduced at trial was directed at establishing how the leakage into the aquifer occurred. It is undisputed that some of the contamination of the underlying aquifer was caused by leakage from one level of the aquifer to another through the annular spaces of the monitoring wells. Also, experts on both sides concluded that the disposal of the

SPL into the unlined pit caused some contamination of the aquifer prior to the introduction of the monitoring wells.

The district court granted summary judgment in favor of Gilmore, which had claimed that Lindsay's causes of action were time barred by the statute of limitations.

At the close of Lindsay's case, the court sustained the defendants' motions to dismiss each cause of action except for the cause of action against Layne-Western for negligence and part of Lindsay's action against Christiansen for breach of contract. The defendants' motions for directed verdict were overruled. At the close of all evidence, the defendants moved to dismiss the remaining causes of action. The motions were sustained in part. The defendants renewed their motions for directed verdict, but the motions were overruled.

After the ruling on the foregoing motions, Lindsay's remaining allegations against Christiansen were that Christiansen breached its contract (1) in failing to fulfill and comply with the plans and specifications and contract documents of the facility; (2) in not performing the contract monitoring wells' installation pursuant to the best known workmanship; and (3) in not performing its work and services in a skillful, careful, diligent, and workmanlike manner.

Lindsay's remaining allegation against Layne-Western was that Layne-Western was negligent (1) in "failing to adequately and properly design, select and install proper and sufficient materials, drill, fabricate, assemble and install the ground water monitoring wells for their intended use"; (2) in failing to adequately and properly investigate, examine, inspect, sample, test, analyze, and study the subsurface soil and hydrogeological conditions on the premises; (3) in failing to consult with, retain, or engage the services of a trained, qualified, and competent hydrogeologist regarding the subsurface soil and hydrogeological conditions at the premises; (4) in failing to perform its work in a reasonably good and workmanlike manner; (5) in failing to warn and notify Lindsay of the risk and danger of pollution and contamination of aquifer and ground water that would result from the manner and materials that Layne-Western used in installation of the ground water

monitoring wells; and (6) in failing to provide and install the proper and sufficient materials in the ground water monitoring wells in compliance with the applicable federal laws and industry standards.

After a trial on these remaining causes of action, the jury returned a verdict for the defendants.

ASSIGNMENTS OF ERROR

Lindsay's 34 assignments of error, as summarized, assert that the district court erred (1) in finding that Lindsay's causes of action against Gilmore were time barred and in granting Gilmore's motion for summary judgment on that basis; (2) in instructing the jury to the effect that Gilmore was an agent of Lindsay and that Gilmore's negligence was attributable to Lindsay; (3) in instructing the jury so that tort defenses were applied to contract claims; (4) in instructing the jury that Christiansen's only duties under contract were to follow the plans and specifications contained therein; (5) in naming the dismissed party, Gilmore, in the caption of the instructions; (6) in failing to instruct the jury on the law concerning a nonparty, involved third person; (7) in allowing a document admitted for a limited purpose to be subsequently used for other purposes without the repetition of precautionary statements to the jury; (8) in not admitting evidence on a routine business practice of Layne-Western offered to show Layne-Western's negligence; (9) in failing to instruct the jury that digging near a hazardous waste lagoon is an ultrahazardous activity; (10) in striking from Lindsay's petition particulars plead with respect to Christiansen's breach of contract; (11) in failing to instruct the jury concerning efficient intervening cause with regard to Lindsay's case; (12) in submitting as a particular of contributory negligence the concept of mitigation of damages; and (13) in failing to submit to the jury a verdict form which would allow the jury to hold both Layne-Western and Christiansen liable.

Both Layne-Western and Christiansen cross-appeal and assign as error the overruling of their respective motions for directed verdict at the close of all evidence.

STANDARD OF REVIEW

In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Zwingman v. Kallhoff*, 244 Neb. 514, 507 N.W.2d 894 (1993); *Murphy v. Spelts-Schultz Lumber Co.*, 240 Neb. 275, 481 N.W.2d 422 (1992); *Spittler v. Nicola*, 239 Neb. 972, 479 N.W.2d 803 (1992). Moreover, summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Zwingman v. Kallhoff, supra*; *Murphy v. Spelts-Schultz Lumber Co., supra*; *Moore v. Hartford Fire Ins. Co.*, 240 Neb. 195, 481 N.W.2d 196 (1992); *Barelmann v. Fox*, 239 Neb. 771, 478 N.W.2d 548 (1992).

A party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law if the evidence presented for summary judgment remains uncontroverted. After the moving party has shown facts entitling it to a judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents judgment as a matter of law for the moving party. *Murphy v. Spelts-Schultz Lumber Co., supra*; *Spittler v. Nicola, supra*; *Flamme v. Wolf Ins. Agency*, 239 Neb. 465, 476 N.W.2d 802 (1991).

It is a well-settled rule in this jurisdiction that with regard to the overruling of a motion for directed verdict made at the close of all the evidence, appellate review is controlled by the rule that a directed verdict is proper only where reasonable minds cannot differ and can only draw but one conclusion from the evidence, where an issue should be decided as a matter of law. *Kozeny v. Miller*, 243 Neb. 402, 499 N.W.2d 75 (1993); *Commerce Sav. Scottsbluff v. F.H. Schafer Elev.*, 231 Neb. 288, 436 N.W.2d 151 (1989).

A trial court should direct a verdict as a matter of law only

when the facts are conceded, undisputed, or such that reasonable minds can draw but one conclusion therefrom. *Kozeny v. Miller, supra*; *Sundeen v. Lehenbauer*, 229 Neb. 727, 428 N.W.2d 629 (1988). The party against whom the verdict is directed is entitled to have every controverted fact resolved in his or her favor and to have the benefit of every inference which can reasonably be drawn from the evidence. If there is any evidence which will sustain a finding for the party against whom the motion is made, the case may not be decided as a matter of law. *Leonard v. Wilson*, 238 Neb. 1, 468 N.W.2d 604 (1991); *Carnes v. Weesner*, 229 Neb. 641, 428 N.W.2d 493 (1988).

As to questions of law, an appellate court has an obligation to reach a conclusion independent from a trial court's conclusion in a judgment under review. *Bell Abstract & Title v. Caro, Inc.*, 243 Neb. 576, 500 N.W.2d 834 (1993); *FirsTier Bank v. Triplett*, 242 Neb. 614, 497 N.W.2d 339 (1993).

STATUTE OF LIMITATIONS

Lindsay first argues that the district court erred in determining that its claims against Gilmore, filed December 11, 1986, were time barred. Lindsay claims that under Neb. Rev. Stat. § 25-222 (Reissue 1989), it had 2 years from July 15, 1985, the date the construction project was certified as complete, before the limitations period would run out.

We have held that the point at which a statute of limitations begins to run must be determined from the facts of each case, and the decision of the district court on the issue of the statute of limitations normally will not be set aside by an appellate court unless clearly wrong. *Board of Regents v. Wilscam Mullins Birge*, 230 Neb. 675, 433 N.W.2d 478 (1988). However, when reviewing a question of law, an appellate court is obliged to reach a conclusion independent of the trial court's rulings. *Central States Resources v. First Nat. Bank*, 243 Neb. 538, 501 N.W.2d 271 (1993).

As both parties assert, § 25-222 contains the limitations period applicable to an engineer rendering professional services. See *Board of Regents v. Wilscam Mullins Birge, supra*. Under the terms of § 25-222, if an action is not to be considered

time barred, the plaintiff must either file within 2 years of an alleged act or omission or show that its action falls within the exceptions of this section as to its discovery of the defendant's alleged negligence. *Kelly Klosure v. Johnson Grant & Co.*, 229 Neb. 369, 427 N.W.2d 44 (1988).

A cause of action accrues for negligence in professional services when the alleged act or omission in rendering or failure to render professional services takes place. *Murphy v. Spelts-Schultz Lumber Co.*, 240 Neb. 275, 481 N.W.2d 422 (1992). Lindsay, in its third amended petition, essentially alleged that Gilmore was negligent in designing the wells and in inspecting the construction of the wells. Thus, by the time the wells were complete, December 21, 1982, the alleged negligent act or omission had taken place. The cause of action, therefore, could have accrued no later than that date. Thus, in the absence of an exception to toll the statute from running, in order to avoid being time barred, Lindsay would have had to have filed by December 21, 1984.

However, Lindsay asserts that there is an exception which tolled the statute of limitations, making its December 11, 1986, filing timely. In support of its position, Lindsay principally relies on *Board of Regents v. Wilscam Mullins Birge, supra*. In that case, we held: "[T]he 2-year statute of limitations under § 25-222, applicable to an architect who has the responsibility to design a building and a duty to inspect throughout construction, begins to run when the construction is completed." 230 Neb. at 683, 433 N.W.2d at 483. This rule is commonly referred to as the "continuous representation" rule.

Gilmore, however, relies on *Economy Housing Co. v. Rosenberg*, 239 Neb. 267, 475 N.W.2d 899 (1991). In that case, we held that the continuous representation rule, which tolls the running of the statute of limitations, is inapplicable where the claimant discovers the alleged negligence prior to the termination of the professional relationship.

Therefore, the question here is whether, as Gilmore maintains, Lindsay discovered the alleged negligence prior to the termination of the professional relationship. It is undisputed that as of September 25, 1984, Lindsay knew that the monitoring wells accelerated the deterioration of the ground

water quality in the aquifer. However, Lindsay maintains such knowledge does not constitute discovery. Lindsay maintains that it was not until June 12, 1986, when the "Second Status Report on Aquifer Restoration" was released, that it discovered Gilmore's alleged negligence. It was not until that date, Lindsay argues, that it knew that the contamination of the aquifer was due solely to the introduction of the monitoring wells.

However, "discovery," in the context of statutes of limitations, refers to the fact that one knows of the existence of an injury and not that he has a legal right to seek redress. *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.*, 244 Neb. 408, 507 N.W.2d 275 (1993); *Board of Regents v. Wilscam Mullins Birge*, 230 Neb. 675, 433 N.W.2d 478 (1988). We have further held that it is not necessary that a plaintiff have knowledge of the exact nature or source of the problem, but only that a problem existed. *Economy Housing Co. v. Rosenberg, supra.* Clearly, as of September 25, 1984, this criteria had been met. It was on this date that Lindsay knew the monitoring wells accelerated the deterioration of the ground water. Since Lindsay discovered the alleged negligence on this date, which was prior to the termination of the professional relationship, the continuous representation rule was inapplicable and thus did not toll the statute of limitations.

The discovery exception to the statute of limitations also did not toll the running of the statute in this case. We have held that the discovery exception to the statute of limitations is inapplicable if facts are discovered that constitute the basis of a cause of action within 2 years from the alleged act of negligence. *Economy Housing Co. v. Rosenberg, supra.* It was thus inapplicable here, where as established above, facts constituting the basis for this cause of action were discovered no later than September 25, 1984, within 2 years from December 21, 1982, when the last alleged act of negligence took place.

Since the petition was not filed within 2 years of the last date the cause of action could have accrued, and since there were no exceptions to toll the running of the statute, Lindsay's claims against Gilmore were time barred by § 25-222. Therefore, the trial court's grant of summary judgment in favor of Gilmore was proper.

ISSUES ON CROSS-APPEAL

Next, we consider the remaining defendants' cross-appeals. Both defendants assert that the trial court erred in failing to grant their motions for directed verdict made at the close of all evidence.

CHRISTIANSEN'S APPEAL

On cross-appeal, Christiansen contends that the trial court should have directed a verdict on the breach of contract claim brought by Lindsay. By the end of trial, Lindsay's remaining allegations were that Christiansen breached its contract (1) in failing to fulfill and comply with the plans, specifications, and contract documents of the facility; (2) in not performing the contract monitoring wells' installation pursuant to the best known workmanship; and (3) in not performing its work and services in a skillful, careful, diligent, and workmanlike manner.

With respect to the alleged breach of contract, both parties rely on the following rule:

> "Where a contractor makes an absolute and unqualified contract to construct a building or perform a given undertaking, it is the general, and perhaps universal, rule that he assumes the risks attending the performance of the contract, and must repair and make good any injury or defect which occurs or develops before the completed work has been delivered to the other party. But where he makes a contract to perform a given undertaking in accordance with prescribed plans and specifications, this rule does not apply. Under such a contract he is not permitted to vary from the prescribed plans and specifications even if he deems them improper and insufficient; and therefore cannot be held to guarantee that work performed as required by them will be free from defects, or withstand the action of the elements, or accomplish the purpose intended. Where the contract specifies what he is to do and the manner and method of doing it, and he does the work specified in the manner specified, his engagement is fulfilled, and he remains liable only for defects resulting from improper

workmanship or other fault on his part."

State v. Commercial Casualty Ins. Co., 125 Neb. 43, 50-51, 248 N.W. 807, 810-11 (1933). See, also, *Langel Chevrolet-Cadillac v. Midwest Bridge*, 213 Neb. 283, 329 N.W.2d 97 (1983); *Fuchs v. Parsons Constr. Co.*, 166 Neb. 188, 88 N.W.2d 648 (1958); *Fuchs v. Parsons Constr. Co.*, 172 Neb. 719, 111 N.W.2d 727 (1961).

Christiansen asserts that the performance rendered was, in all material respects, in accordance with plans and specifications provided and that Lindsay, therefore, cannot hold Christiansen liable for the defectiveness or insufficiency of the plans, but only for those defects resulting from improper workmanship.

Lindsay, however, asserts that because Christiansen failed to comply with the plans and specifications, Christiansen assumed the risk attending the performance of the contract. Furthermore, Lindsay submits that the trial court erred in failing to instruct the jury in that respect.

The issue before us, therefore, is whether the plans and specifications in the contract were followed. The plans reveal that the monitoring wells were originally intended to be dug to a depth of 110 feet and that only the first 3 feet below ground level of the annular spaces were to be filled with bentonite clay. As built, the wells were dug to a depth of approximately 58 feet, and the first 26 feet of the annular spaces were filled with bentonite clay. Gilmore preapproved the change in depth, but not the change in the fill of the annular spaces. Notwithstanding this evidence, we note that the contract between Lindsay and Gilmore contained the following provisions:

> 27.1 The Engineer [Gilmore] shall act as the Owner's [Lindsay's] representative during the construction period. *He shall decide questions which may arise as to quality and acceptability of materials furnished and work performed.* He shall interpret the intent of the Contract Documents in a fair and unbiased manner.

(Emphasis supplied.)

Further, we note that Gilmore certified that "construction of the acid waste treatment facility, including work incidental

thereto, has been completed and contract, therefore, has been fully performed in accordance with the plans and specifications . . . ." We also note that uncontroverted evidence establishes that Lindsay paid Christiansen pursuant to the certificate of payment issued by Gilmore covering the installation of the monitoring wells.

In *City of Gering v. Smith Co.*, 215 Neb. 174, 337 N.W.2d 747 (1983), we held that an express or implied acceptance of work as in compliance with a building contract operates as a waiver of defective performance. However, this rule is inapplicable where the acceptance was under protest or induced by fraud, or where the defects were latent and unknown to the owner. *Id.* In that case, the City of Gering hired Smith Company to construct a sewer. Upon completion of the construction, the city's engineer issued a certificate to the city stating that the sewer had been completed in accordance with the terms of the contract. The engineer also recommended that the city accept the work. Pursuant to the engineer's recommendation, the city council accepted the work. Notwithstanding the certification and acceptance, one of the engineers working on the job knew that the sewer had a sag in it. Although the city officials testified that they were unaware of the sag at the time they accepted the work, we held that this did not affect the validity of the waiver. We held that knowledge of the engineer-agent was knowledge of the principal. "If the City intended to object to the work because of the sag, a fact known to the City's engineer, it had to do so before accepting the work in reliance upon its engineer's certificate." 215 Neb. at 180, 337 N.W.2d at 751.

Likewise, if Lindsay was going to object to the construction of the wells, it had to do so before accepting the work in reliance upon Gilmore's certificate. As in *City of Gering*, Lindsay's acceptance of the work operated as a waiver of defective performance. Lindsay has neither pled nor attempted to prove that its acceptance was induced by fraud or was made under protest. In light of Lindsay's express waiver, the trial court should have directed a verdict for Christiansen.

LAYNE-WESTERN'S APPEAL

On cross-appeal, Layne-Western also claims that the trial court erred in failing to direct a verdict in its favor on the negligence action brought by Lindsay. At the end of trial, Lindsay's remaining allegations against Layne-Western were that Layne-Western was negligent in the following particulars: (1) "failing to adequately and properly design, select and install proper and sufficient materials, drill, fabricate, assemble and install the ground water monitoring wells for their intended use"; (2) failing to adequately and properly investigate, examine, inspect, sample, test, analyze, and study the subsurface soil and hydrogeological conditions on the premises; (3) failing to consult with, retain, or engage the services of a trained, qualified, and competent hydrogeologist regarding the subsurface soil and hydrogeological conditions at the premises; (4) failing to perform its work in a reasonably good and workmanlike manner; (5) failing to warn and notify Lindsay of the risk and danger of pollution and contamination of aquifer and ground water that would result from the manner and materials that Layne-Western used in installation of the ground water monitoring wells; and (6) failing to provide and install the proper and sufficient materials in the ground water monitoring wells in compliance with the applicable federal laws and industry standards. Rather than building the wells which it contracted to build, the wells designed by Lindsay's own engineer, it appears that Lindsay would have had Layne-Western undertake all the investigation and testing necessary to design and build the wells and then design and build them.

In order to establish these duties, Lindsay relied on the testimony of one of its expert witnesses, Roy Elliott. Elliott testified that a well driller

> would want to either retain or talk to a geotechnical engineer, a geologist, or a hydrogeologist about the circumstances at the site and whether the acid could move into areas where he is going to advance a drill, or where he is going to remove fluids or where he is going to place a well.

He also said that a driller "would want to make sure that they

are not drilling into any contamination and driving it around either down with the bits or letting it drain someplace."

However, the value of the opinion of an expert witness is no stronger than the facts upon which it is based. *Mutual of Omaha v. Broussard*, 233 Neb. 916, 448 N.W.2d 600 (1989). In any event, the question of whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation. *Schmidt v. Omaha Pub. Power Dist.*, 245 Neb. 776, 515 N.W.2d 756 (1994).

For actionable negligence to exist, there must be a legal duty on the part of the defendant to protect the plaintiff from injury, a failure to discharge that duty, and damage proximately resulting from the undischarged duty. *Id.*

> " '[D]uty' is a question of whether the defendant is under any obligation for the benefit of the particular plaintiff; and in negligence cases, the duty is always the same—to conform to the legal standard of reasonable conduct in light of the apparent risk. . . .
>
> "A duty, in negligence cases, may be defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another."

Id. at 786, 515 N.W.2d at 763.

The facts in this case are that Layne-Western was hired by Christiansen, not Lindsay. There is no evidence of a contract between Layne-Western and Lindsay. It is the law in Nebraska that in the absence of a binding agreement, express or implied, there is no privity of contract between a subcontractor and a landowner who employs the general contractor who hired the subcontractor. See, *Barnes v. Hampton*, 198 Neb. 151, 252 N.W.2d 138 (1977), *disapproved on other grounds, Van Pelt v. Greathouse*, 219 Neb. 478, 364 N.W.2d 14 (1985); *Boyd v. Benkelman Public Housing Authority*, 188 Neb. 69, 195 N.W.2d 230 (1972). Thus, there is no privity of contract between Layne-Western and Lindsay.

In Nebraska, the general rule is that one not a party to a construction contract cannot, for injuries received after the acceptance of the completed work by the contractee, maintain an action in tort for the negligent performance of the contract.

Stover v. Ed Miller & Sons, Inc., 194 Neb. 422, 231 N.W.2d 700 (1975). In *Stover*, a general contractor hired the defendant subcontractor to perform excavation work. The contract between the parties explicitly provided that the general contractor and not the subcontractor would be responsible for shoring the walls of the excavation. The subcontractor completed the excavating work and left the jobsite. Later, employees of the general contractor, including the plaintiff, began working on the shoring job. During the progress of the shoring work, one wall of the excavation collapsed and the plaintiff was injured. The plaintiff sued the defendant, alleging that the defendant was negligent in failing to shore the walls. The trial court granted the defendant's motion for summary judgment and dismissed the case. On appeal, finding first that there was no privity of contract between the plaintiff and the defendant and second that the defendant had no duty to do the shoring work, this court affirmed the grant of summary judgment.

In the case at hand, it is undisputed that Lindsay hired Gilmore to design the wells and to oversee their construction. Moreover, Gilmore was contractually obligated to observe the applicable laws, many of which were drafted in order to prevent the contamination of ground water. That Gilmore failed to design wells that would prevent contamination does not impose additional responsibilities upon Layne-Western. Layne-Western contractually agreed with Christiansen to build four monitoring wells for $10 a foot. Given the limited evidence of the oral contract Layne-Western had with Christiansen, it cannot be said that Layne-Western had the extensive duties which Lindsay alleges Layne-Western had. Since, as discussed in the previous section, the work performed was accepted, Lindsay cannot maintain an action for the negligent performance of a contract against Layne-Western.

Although we have never had occasion to adopt the rule, other jurisdictions faced with similar cases have held that an independent contractor owes no duty to third persons to judge the plans, specifications, or instructions which he has merely contracted to follow unless they are so obviously dangerous that no competent contractor would follow them. See, *Hunt v.*

Blasius, 74 Ill. 2d 203, 384 N.E.2d 368 (1978); *Ryan v. Feeney & Sheehan Building Co.*, 239 N.Y. 43, 145 N.E. 321 (1924); *Leininger v. Stearns-Roger Manufacturing Company*, 17 Utah 2d 37, 404 P.2d 33 (1965); *Davis v. Henderlong Lumber Company*, 221 F. Supp. 129 (N.D. Ind. 1963); *Person v. Cauldwell-Wingate Co.*, 187 F.2d 832 (2d Cir. 1951), *cert. denied* 341 U.S. 936, 71 S. Ct. 855, 95 L. Ed. 1364. Lindsay has not alleged or proved that the plans and specifications were so obviously dangerous that no competent contractor would follow them. Layne-Western, therefore, was under no duty to judge the plans provided or redesign the wells. Layne-Western only had a duty to follow them, which it did in all material respects. That the annular spaces were filled with more bentonite than the plans called for is of no consequence. Lindsay's own expert, Elliott, testified that the change in the amount of bentonite was not a cause of the contamination.

Under the facts of this case, as a matter of law, Layne-Western did not owe the duties to Lindsay which Lindsay alleged. In the absence of any duty, Layne-Western could not be held liable. The district court should have granted Layne-Western's motion for a directed verdict at the close of all evidence.

REMAINING ASSIGNMENTS OF ERROR

We do not address the remaining assignments of error, either because our holding obviates the need to address the issues raised or because they are entirely without merit.

CONCLUSION

The judgment entered by the district court was proper, and it is therefore affirmed.

AFFIRMED.

WHITE, J., not participating.

STEPHEN R. STYSKAL, D.D.S., APPELLANT, V. GREGG F. WRIGHT, M.D., M.ED., AND DEPARTMENT OF HEALTH, STATE OF NEBRASKA, APPELLEES.

519 N.W.2d 543

Filed July 29, 1994. No. S-91-906.

1. **Administrative Law: Statutes: Time: Appeal and Error.** Where the proceedings for review of an administrative hearing are initiated in the district court after July 1, 1989, the review will be conducted by the district court without a jury de novo on the record of the agency as required by Neb. Rev. Stat. § 84-917(5)(a) (Cum. Supp. 1992).
2. **Administrative Law: Judgments: Final Orders: Time: Appeal and Error.** The decision of the district court after review under the Administrative Procedure Act may be appealed to the Nebraska Court of Appeals, and in cases where the petition instituting review was filed in the district court after July 1, 1989, the judgment rendered or final order made by the district court may be reversed, vacated, or modified for errors appearing on the record.
3. **Constitutional Law: Statutes: Standing.** To have standing to challenge the federal or state constitutionality of a statute, the contestant must be one who is, or is about to be, adversely affected by the language in question and must show that as a consequence of the alleged unconstitutionality, the contestant is deprived of a constitutionally protected right.
4. _____: _____: _____. In order to have standing to assert a claim of vagueness, a defendant must not have engaged in conduct which is clearly prohibited by the questioned statute and cannot maintain that the statute is vague when applied to the conduct of others.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed.

Steven E. Achelpohl and John W. Steele, of Schumacher & Achelpohl, for appellant.

Don Stenberg, Attorney General, and Melanie J. Whittamore-Mantzios for appellees.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, FAHRNBRUCH, and LANPHIER, JJ., and GRANT, J., Retired.

GRANT, J., Retired.

A disciplinary action was filed before the director of the State Department of Health, Gregg F. Wright, M.D., against Stephen R. Styskal, D.D.S., by the Attorney General of Nebraska. The petition alleged that Styskal had engaged in grossly immoral, dishonorable conduct showing a lack of

fitness to practice dentistry in Nebraska, in violation of Neb. Rev. Stat. § 71-147(2) (Reissue 1990); that Styskal had practiced dentistry beyond its authorized scope, in violation of § 71-147(5)(b); and that Styskal had engaged in unprofessional conduct, in violation of § 71-147(10).

After a hearing before an examiner designated by the director, the director issued his order finding that Styskal had violated each of the statutory sections. The director revoked Styskal's license to practice dentistry in Nebraska.

Styskal timely appealed from the director's decision to the district court for Lancaster County pursuant to Neb. Rev. Stat. § 84-917 (Cum. Supp. 1992) by filing a petition in which Styskal was plaintiff, and the director of the State Department of Health and the State Department of Health were defendants.

Where the proceedings for review of an administrative hearing are initiated in the district court after July 1, 1989, the review will be conducted by the district court "without a jury de novo on the record of the agency" as required by § 84-917(5)(a). After its review, the district court, in a 12-page opinion, stated that the court believed that the account of the State's witnesses was accurate, and the court found, by clear and convincing evidence, that Styskal had violated each of the statutes alleged in the proceedings against him to have been violated. The district court modified the director's order and issued its order suspending Styskal's license to practice dentistry for 2 years from June 4, 1991, with the further requirement that after that time, Styskal was to be on probation for the practice of dentistry and subject to certain conditions.

Styskal timely appealed to the Nebraska Court of Appeals. We removed the case to this court under the authority of Neb. Rev. Stat. § 24-1106(3) (Cum. Supp. 1992) in order to regulate the caseloads of the Nebraska appellate courts and because Styskal raised the question of the constitutionality of certain Nebraska statutes. In his appeal, Styskal assigns three errors. He contends that the district court erred as a matter of law in interpreting Neb. Rev. Stat. § 71-183(6) (Reissue 1990) to limit dental diagnosis and treatment to the areas of the neck and above. He then contends in his second assignment of error that "[t]he District Court's erroneous legal interpretation with

respect to the allowable scope of dentistry impermissibly infected its determination of the facts." Finally, Styskal contends that "[t]he dentistry statutes under which [he] was disciplined are unconstitutionally overbroad and vague on their face and as applied in this case." We note, in connection with his second assignment of error, that Styskal in his brief specifically states that he does not raise the question of sufficiency of the evidence. We agree that the evidence is sufficient to support the judgment, and for the reasons hereinafter stated, we do not reach the other questions presented. We affirm.

The record before us shows the facts hereinafter set out. Styskal was licensed to practice dentistry in Nebraska in 1979. He practiced dentistry in Grand Island, Nebraska, after that time until his license to practice dentistry was suspended.

The State's disciplinary action against Styskal was based on his conduct with a female patient, Elpidia Zavala, on February 17, 1990. Zavala is from Mexico and had lived in the United States since 1985. On December 19, 1988, she was in an automobile accident in Grand Island in which she injured her jaw, chest, neck, and back. After the accident, Zavala was examined at St. Francis Medical Center in Grand Island. X rays of her skull, chest, and cervical spine were taken. Zavala later consulted a chiropractor in Grand Island; an orthopedic surgeon in Hastings, Nebraska; and a dentist in Grand Island, Dr. Gerald Murphy. All of these consultations were before Zavala saw Styskal. The orthopedic surgeon and the chiropractor evaluated the x rays taken at St. Francis Medical Center. On January 31, 1989, Dr. Murphy took and evaluated x rays of Zavala's jaw and did a thorough clinical dental examination. No examining health professional found any broken bones. The general conclusion was that Zavala had suffered a cervical strain with some associated injury.

Dr. Murphy's opinion was that Zavala had suffered a "traumatically induced internal derangement of the temporomandibular joint with a muscle dysfunction." Dr. Murphy testified that as a dentist, he specialized in "cranial mandibular disorders," which he defined as "a branch of dentistry that deals with the musculoskeletal interrelationship of the jaw to the cranium and the cranium to the cervical spine."

Dr. Murphy testified that he was a fellow in the American Academy of Head, Neck, and Facial Pain, which is an association formed by health care professionals, including dentists, having an interest in that specialized field.

Dr. Murphy further testified that an injury of the type Zavala suffered was first referred to as TMJ (temporomandibular joint disorder), but that the correct term is temporomandibular disorder or craniomandibular disorder. Throughout the hearing, the condition was usually referred to as "TMD," and we will, as did the learned district judge on appeal, so refer to the condition in this opinion. No party in this case contends that Dr. Murphy is not an expert in the field of TMD.

Dr. Murphy explained there is a direct biomechanical and functional interrelationship between the craniomandibular and the craniocervical complex. In order to more easily determine the thrust of Dr. Murphy's testimony, we note the following definitions from the Sloane-Dorland Annotated Medical-Legal Dictionary (1987): "Temporomandibular" is defined as " 'pertaining to the temporal bone and the mandible.' " *Id.* at 696. (The temporal bone is one of the two irregular bones forming part of the lateral surfaces and base of the skull.) "Cranium" means "the skeleton of the head, variously construed as including all of the bones of the head . . . except the mandible." *Id.* at 171. "Mandible" or "mandibula" means "the bone of the lower jaw," *id.* at 431, and "cervical" means "pertaining to the neck," *id.* at 132.

Dr. Murphy testified that because of the interrelation of the bones and muscles of the head, neck, and upper part of the body, it was within proper dental practice to check the various muscles in that part of the body to determine if a relatively remote muscle might be causing facial pain in a patient's jaw.

The American Academy of Head, Neck, and Facial Pain recommended that various muscle palpations should be performed on, among others, the trapezius muscle, the pectoralis muscle, and the sternalis muscle. These palpations may lead to the discovery of a "trigger point," a term which Dr. Murphy defined as an area within a muscle where the muscle is dysfunctional. Dr. Murphy explained as an example that pressure on a trigger point in the trapezius muscle, the large

muscle in the shoulder, could cause pain in the side of a patient's head. In that situation, treatment of the trigger point in the muscle might relieve the pain in the side of the head.

Dr. Murphy's position on the effect of muscle dysfunction in other parts of the body causing pain in a dental patient's jaw was summarized in an article he had written entitled "Myofascial Trigger Points." This article was received as exhibit 9 and stated, in part:

> Although some of the pain associated with craniomandibular disorders may be arthralgic [pain in a joint], in the vast majority of cases it is myalgic [pain in a muscle]. Such pain is often the direct result of muscle spasm, trigger points, or a combination of the two. To correct the pain pattern, you must correct the muscle dysfunction.

Styskal's contention in response to the allegations that he had engaged in immoral, dishonorable, and unprofessional conduct in his treatment of Zavala was that he was only attempting to determine what was causing the pain in her jaw in order that the pain could be relieved. In other words, Styskal's position is that his actions in this matter with regard to Zavala were proper and professional and within the scope of the practice of dentistry in that he was applying procedures of the type described by Dr. Murphy in order to diagnose and treat TMD in his patient's jaw.

Styskal first saw Zavala as a patient on February 15, 1989. Zavala testified that she told Styskal that she had seen Dr. Murphy, that Dr. Murphy told her she had a TMD and needed a "plate," and that she went to Styskal to get a plate. In his office, she completed a patient questionnaire with the aid of the dental assistant. Styskal was informed that Zavala had been in an automobile accident and had seen a medical doctor, a chiropractor, and a dentist, Dr. Murphy. He then examined Zavala. Present in his examining room at this time were Zavala; her husband; Connie Yarina, a dental assistant; and Styskal. Styskal testified that his examination included "palpation of trigger points, palpation of all those muscles that I talked about, the shoulder, neck. . . . I had Mrs. Zavala raise the back of her sweater so that I could palpate those muscles, the

trapezius muscle, and we checked her spine alignment." Zavala did not want further x rays because Dr. Murphy had already taken them. Styskal then said he could talk to Dr. Murphy and that he would also consult the chiropractor who had been treating Zavala.

Styskal next saw Zavala on Friday, February 17. Apparently, Zavala's husband first set up the time for 1:30 p.m. He then called back and changed the time to 3:30 p.m., because Zavala was working until 3 o'clock. When Zavala returned to her home after work, she told her husband that she had an appointment with the chiropractor. Styskal's office was so informed. It was then agreed that Zavala could come to Styskal's office when she finished her visit to the chiropractor. The appointment had been made for a Friday afternoon, which was a time when Styskal's dental assistant was ordinarily off work. The assistant waited in the office, however, until approximately 5 p.m. so that she could assist in the examination, but left the office before the Zavalas appeared shortly after 5 p.m.

Styskal took Zavala and her husband into the examining room. The husband remained in the room throughout the examination. Styskal told them that he had talked to Dr. Murphy and the chiropractor about her condition. He showed them a chart of the bone structure and spinal cord area in the back of the body, as he had done at the first consultation. Styskal again told the husband that he wanted to show the husband where Zavala's problems were and then the husband could do something to alleviate Zavala's pain by giving her physical therapy in the form of massage.

Styskal then gave Zavala a massage on her back. Zavala testified that Styskal pulled her blouse up and massaged her upper back and lower back with his whole palm and with his fingertips and that he then pulled her pants and underpants down to a point about the middle of her buttocks. Zavala then testified that Styskal "stuck his finger in my rear end."

After these incidents, Styskal told her to sit in the dental chair, where he checked her jaw again, and asked Zavala where her pain was. When she mentioned pain in her chest, Styskal pulled her sweater up and began touching her chest. Zavala

testified that "he pulled up my right cup of my bra," exposing her bare breast. Zavala testified that "I was uncomfortable when he pulled down my pants . . . but when he touch my breast, my bare breast, I had no doubt of his intentions and I got so scared I was afraid."

Zavala then testified that after this, Styskal said, "That's all I can do for you guys. I can't do anything," and then gave her two pats on the stomach and said, "I don't take any litigation cases. I refer you to Dr. Murphy."

Zavala's husband testified that he was with his wife at all times during Styskal's examination of her on February 17. He testified that Styskal used the same chart as on the 15th and massaged Zavala's back while telling him how he could make her feel better. Zavala's husband then testified that Styskal then began massaging farther down "to the lower part of the tailbone," and he saw Styskal's "two fingers stretching the elastic on her pants and from there I turned my head." When asked why he turned his head, the husband testified: "Because I was stunned. I couldn't believe it. I was, you know, I was scared . . . I didn't know what to do, you know." When asked why he was scared, he testified, "I felt helpless okay. I just couldn't believe what was going on."

After this, Zavala was directed by Styskal to get back in the dental chair, where he began touching her on the chest over her clothing and asking where her pain was. Zavala's husband testified that as Styskal "kept on jabbing," his wife's shirt was up, and he saw the side of his wife's breast. Zavala's husband testified that Styskal then stated he was done, that he thought a plate would be better, and that he "doesn't work with people with allegations [sic] since it was a car accident," but that if the Zavalas wanted another dentist, he would volunteer his information.

The charge for the first visit to Styskal had been paid, and after the second visit was concluded, he told the Zavalas that there was no charge for the second visit.

In his testimony, Styskal generally testified to his knowledge of TMD and his method of treating it. He testified that he knew of trigger points and how pain could be referred from a muscle to a joint in the head or jaw. He also testified that during the

two visits of the Zavalas, he had used a chart to explain to Zavala's husband how he might alleviate Zavala's pain by massage. Styskal denied that he ever touched Zavala's buttocks or that he ever raised her sweater for any examination. In connection with the examination of her back, Styskal testified that Zavala had raised her sweater and that he had lifted the sweater "an inch or two at the very most . . . just to show the spine and the fact that it was straight." In connection with the examination of Zavala's chest, he stated that she had lifted her sweater to "about mid-chest, which was sufficient." Styskal then testified, "I might have lifted it up a little bit more, but she lifted it up." Styskal further testified that he did not believe he had moved her bra at all, and when asked if he had moved the bra strap between her breasts, he replied: "You know, when you're palpating that sternalis [muscle], you will run in contact with that and touch that, but that's it."

Styskal testified he was checking the patient's chest bone "for the sternalis muscle, the trigger point, it's associated." When asked if he was checking for cracked ribs or a cracked sternum, he replied:

> That you do in conjunction with the stern—you know, you're just—when you do that you're looking for a hot muscle. She might have had a muscle in spasm, she might have had a trigger point, whatever, and I, you know, in the process of it it's hard for me to tell whether it's cracked or broken or something of that nature and you refer them to a physician for that. But I just gave her choices of what possibly could be there.

When asked if he had recommended to Zavala that she wear an Ace bandage, he replied:

> I said that may be what treatment option is available. I was a corpsman in the Navy and when you found some stuff like that you had to wrap them in Ace wrap. There isn't a lot can be done for a cracked—and I was just surmising that might be a problem and that might be some way they resolve it, I was just trying to be helpful to her.

Other than testimony as to the facts of Zavala's consultations with Styskal, the record shows that four Nebraska-licensed dentists testified, in addition to Styskal. Dr. Murphy testified,

as set out above, as to TMD and the diagnosis and treatment of TMD problems and that such problems could properly be treated by a dentist. He testified that there was no dental reason to touch a female patient's breast and no dental reason for a dentist to put his hand in a patient's pants.

Dr. Michael Owens, a practicing dentist and a classmate of Styskal in dental school, testified that a dentist who palpated the sternalis muscle or the trapezius muscle in a TMD patient would be acting within the scope of dentistry. He further testified that there is no need for a dentist to go below a patient's pant line, stating that a dentist might do so "inadvertently, but not on purpose, no." He also testified that it would be unprofessional conduct for a dentist to touch a patient's breast "on purpose" and that he would not know why a dentist would need to expose a female patient's breast.

Dr. Thomas Cavel, a dentist in private practice and the chairman of the department of operative dentistry at Creighton University, testified that he had taken postgraduate courses in the treatment of TMD. He further testified that he did not subscribe to the trigger-point theory and that in diagnosing TMD, he would palpate the muscles of mastication looking for tenderness and "do occlusal records, maxillary and mandibular records." He testified that in doing a TMD diagnosis, he would not touch a patient's back or chest. He further testified that it would be grossly dishonorable to lift a patient's shirt in front or in back and that "I don't think there's any reason to be palpating the breast or back or buttocks of any patient."

Dr. Royal Norman testified that he was a licensed dentist. He practiced dentistry in private practice and taught at Creighton University dental school. Dr. Norman testified that trigger-point therapy was not taught at Creighton dental school in 1990, but that it would be in the future, although not with reference to areas below the neck because "it's not our territory, it's not where we come from, and what we are licensed for." He testified that "all of the objectives are pointed toward head and neck only for TMD, and that's the way I feel it should be." He further testified that it was improper and beyond the authorized scope of dentistry for a dentist to lift a patient's shirt in back or front or to lower a patient's pants.

Styskal himself testified that there was no reason for a dentist to put his hands in a patient's pants or to expose a patient's breast while doing a TMD examination.

After consideration of the facts set out above, the director found that Styskal had "touched the bare breast, back, and buttocks of his patient, Elpidia Zavala, and inserted his hand inside her underpants," and concluded that Styskal had violated the provisions of § 71-147(2), (5)(b), and (10).

On appeal to the district court, that court found that the account of the State's witness was accurate and that Styskal had engaged in grossly immoral and dishonorable conduct as prohibited by § 71-147(2), had practiced dentistry beyond its authorized scope in violation of § 71-147(5)(b), and had engaged in unprofessional conduct in violation of § 71-147(10).

As stated above, the review of the district court was de novo on the record, and the district court in its findings agreed with the director. The decision of the district court after review under the Administrative Procedure Act may be appealed to the Nebraska Court of Appeals, and in cases where the petition instituting review was filed in the district court after July 1, 1989, as in this case, "[t]he judgment rendered or final order made by the district court may be reversed, vacated, or modified for errors appearing on the record." Neb. Rev. Stat. § 84-918(3) (Cum. Supp. 1992).

We have carefully examined the voluminous record before us, and we find no errors in the record. The evidence adduced before the director fully supports the conclusion that Styskal has violated the provisions of § 71-147 in the particulars found.

With regard to Styskal's contention that § 71-147(2), which prohibits "grossly immoral or dishonorable conduct"; § 71-147(5)(b), which prohibits the practice of dentistry "beyond its authorized scope"; and § 71-147(10), which forbids "unprofessional conduct," are unconstitutional under the 5th and 14th Amendments to the U.S. Constitution and article I, § 3, of the Nebraska Constitution, we determine that it would be improper for this court to consider those allegations in this case.

Styskal has been found to have touched the buttocks and bare breast of one of his dental patients. His defense is that he

was acting as a person practicing dentistry; that is, one who "[d]iagnoses, or professes to diagnose, . . . treats, or professes to treat disease, pain, deformity, deficiency, injury, or physical condition of the human teeth or jaws, or adjacent structure." § 71-183(6). Styskal would have this court define "adjacent structure" to include the muscles he palpated in this case, such as the trapezius and sternalis, and to determine that his actions were the practice of dentistry in that he was diagnosing and suggesting treatment for TMD. Because of the facts found as to Styskal's conduct in this case, we decline to enter this field.

As stated in *Broadrick v. Oklahoma*, 413 U.S. 601, 609, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973), a case involving political activity:

> In the context of this type of obviously covered conduct, the statement of Mr. Justice Holmes is particularly appropriate: "[I]f there is any difficulty . . . it will be time enough to consider it when raised by someone whom it concerns." *United States* v. *Wurzbach*, [280 U.S. 396, 399, 50 S. Ct. 167, 74 L. Ed. 508 (1930)].

The *Broadrick* Court went on to say:

> Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court.

413 U.S. at 610.

We have followed these "traditional rules governing constitutional adjudication." In *Kwik Shop v. City of Lincoln*, 243 Neb. 178, 181, 498 N.W.2d 102, 105 (1993), we stated:

> To have standing to challenge the federal or state constitutionality of a statute, the contestant must be one who is, or is about to be, adversely affected by the language in question and must show that as a consequence of the alleged unconstitutionality, the contestant is deprived of a constitutionally protected right.

In *State v. Connely*, 243 Neb. 319, 324, 499 N.W.2d 65, 70 (1993), we stated: "In order to have standing to assert a claim of vagueness, [a defendant] must not have engaged in conduct

which is clearly prohibited by the questioned statute and cannot maintain that the statute is vague when applied to the conduct of others."

In the case before us, actions such as those committed by Styskal were stated to be improper by each of the five licensed dentists who testified in the proceeding. As set out above, Styskal himself testified there is no reason for a dentist to put his hands in a patient's underpants or to expose a patient's breast while doing a TMD examination. Styskal's conduct went far beyond any dental examination espoused by any witness or any textbook produced in the proceeding against him.

Any decision in this opinion on the appropriate range of TMD diagnosis and treatment, whether as to the constitutionality or interpretation of § 71-183, would be purely an advisory opinion, which is an activity in which this court endeavors not to engage.

The decision of the district court is affirmed.

AFFIRMED.

CHARLES L. TERRY, APPELLANT, V. WALLACE E. DUFF, M.D., APPELLEE.

519 N.W.2d 550

Filed July 29, 1994. No. S-92-698.

1. **Verdicts: Appeal and Error.** In determining the sufficiency of the evidence to sustain a verdict in a civil case, an appellate court considers the evidence most favorably to the successful party and resolves evidential conflicts in favor of such party, who is entitled to every reasonable inference deducible from the evidence.
2. _____: _____. A civil verdict will not be set aside where evidence is in conflict or where reasonable minds may reach different conclusions or inferences, as it is within the jury's province to decide issues of fact.
3. **Rules of Evidence.** In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not by judicial discretion, except in those instances under the Nebraska Evidence Rules when judicial discretion is a factor involved in the admissibility of evidence.
4. **Rules of Evidence: Expert Witnesses.** The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or

made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

5. **Appeal and Error.** A party cannot complain of error which the party has invited the court to commit.
6. **Records: Appeal and Error.** It is incumbent upon the party appealing to present a record which supports the errors assigned; absent such a record, the decision of the lower court will generally be affirmed.
7. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on a claim of an erroneous instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
8. **Jury Instructions: Appeal and Error.** A jury instruction that misstates issues or defenses and has a tendency to mislead the jury is erroneous.
9. _____: _____. The meaning of an instruction and not its phraseology is the important consideration; where the meaning of an instruction is reasonably clear, it is not prejudicially erroneous.
10. **Appeal and Error.** To be considered by an appellate court, an error must be assigned and discussed in the brief of one claiming that prejudicial error has occurred.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

Michael J. Lehan, of Kelley & Lehan, P.C., and Ivory Griggs for appellant.

David D. Ernst, of Gaines, Mullen, Pansing & Hogan, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ.

FAHRNBRUCH, J.

Charles L. Terry appeals from a jury verdict in favor of Wallace E. Duff, M.D., in Terry's lawsuit against Duff for medical malpractice.

This court previously vacated the judgment and remanded the cause for a new trial because a complete and official bill of exceptions was never filed with this court. See *Terry v. Duff, ante* p. 11, 516 N.W.2d 591 (1994). Subsequent to the filing of our opinion, the clerk of the Douglas County District Court found the original certified bill of exceptions and filed it with the Clerk of the court. Upon the motion of Duff for rehearing, we now consider the case on the merits.

We affirm the order of the district court.

STANDARD OF REVIEW

In determining the sufficiency of the evidence to sustain a verdict in a civil case, an appellate court considers the evidence most favorably to the successful party and resolves evidential conflicts in favor of such party, who is entitled to every reasonable inference deducible from the evidence. *Kozeny v. Miller*, 243 Neb. 402, 499 N.W.2d 75 (1993). A civil verdict will not be set aside where evidence is in conflict or where reasonable minds may reach different conclusions or inferences, as it is within the jury's province to decide issues of fact. *Id.*

FACTS

On October 17, 1988, Duff performed elective sinus surgery on Terry to relieve difficulty in breathing. The surgery normally has a success rate of 85 percent, and 15 percent of patients will have problems postoperatively. Patients who have this type of surgery normally require a minimum of 3 months' postoperative care, and Terry did not improve as much as Duff would have liked. Terry discontinued treatment with Duff on March 6, 1989, and filed his lawsuit against Duff on March 7, 1990.

In his petition, Terry alleged that, as a result of the surgery, he now suffers from a total loss of smell, total loss of taste, and total loss of ability to blow his nose and clear his sinus; that he further suffers headaches, nausea, diarrhea, inability to sleep, and work deterioration; and that he is now totally unemployable.

An issue at trial was the state of Duff's medical records on Terry. Terry presented testimony by document examiners that entries in Duff's office records had not been made on the dates indicated and that the majority of the entries had been made at one sitting. There were also errors in the records, notably statements made by Duff in preoperative and postoperative hospital records, that Terry had had a preoperative computerized tomography scan, when, in fact, he had not.

Duff conceded that his office records on Terry had not been compiled in the same fashion as his other patients' records,

although he denied altering or making additions to the records. Duff claimed that he himself compiled and summarized all the nurses' notes and staff notes on Terry because Terry was a problem patient who intimidated Duff's office personnel from the very beginning. Duff could not recall whether he compiled the record before or after Terry filed suit.

Prior to trial, Terry filed a motion in limine to prevent Duff's expert witness from rendering an opinion based on Duff's medical records on Terry.

However, Terry introduced the medical records into evidence himself, and Terry's own expert witness rendered numerous opinions about Duff's care of Terry based upon the contents of the records.

Terry also objected to jury instruction No. 4, setting forth the elements of negligence and the burden of proof, and submitted a proposed instruction to the court.

The jury rendered a verdict in favor of Duff, and Terry appealed to the Nebraska Court of Appeals. Under our authority to regulate the caseloads of the appellate courts of this state, we removed the matter to this court.

ASSIGNMENTS OF ERROR

Terry assigns as error the trial court's (1) allowing the jury to receive expert medical opinions based upon documents which were created by Duff and which did not have any of the traditional indicia of reliability accorded medical records; (2) giving a jury instruction which required the jury to find Duff negligent on all allegations before returning a verdict for Terry, and failing to give Terry's requested instruction; and (3) overruling Terry's motion for new trial.

ANALYSIS

EXPERT MEDICAL OPINION

In his first assignment of error, Terry asserts that the trial court should not have permitted Duff's expert medical witness, Dr. William Friedman, to render an opinion based on the records produced in the case. The records in question previously had been the subject of Terry's motion in limine and included "medical records from Dr. Duff's office, or his

pre-operative or post-operative dictation at Bergan Mercy Hospital." Terry's motion in limine was renewed at the time Friedman testified and was overruled.

Terry argues that Friedman should not have been permitted to render an expert opinion based on the records in question because

> the records provided by Duff to Friedman were not traditional medical records. They were not prepared at or near the time that the alleged medical services were provided, and the records were subsequently altered. The records may even have been prepared after notice of the lawsuit[;] much of the information contained in the records is false.

Brief for appellant at 21.

In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not by judicial discretion, except in those instances under the Nebraska Evidence Rules when judicial discretion is a factor involved in the admissibility of evidence. *McDonald v. Miller, ante* p. 144, 518 N.W.2d 80 (1994). The basis of opinion testimony by an expert witness is controlled by Neb. Evid. R. 703, Neb. Rev. Stat. § 27-703 (Reissue 1989), which states:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those *perceived by or made known to him at or before the hearing*. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

(Emphasis supplied.)

The record shows that Duff's medical records, as well as his preoperative and postoperative dictations, were entered into evidence by Terry. Terry also had his own expert witness testify extensively about Duff's care of Terry based upon those same records. The information in the records was before the jury and thus was "perceived by or made known" to Friedman at the time of trial through the actions of Terry himself. As a consequence, Friedman was permitted by rule 703 to base his

expert opinion on those records.

Assuming without deciding that it was impermissible for a defense expert to testify based upon Duff's office records and his preoperative and postoperative dictations, it likewise would have been impermissible for Terry's expert to render an opinion on those same records. If it was error for Friedman to testify based upon Duff's records, it was error which Terry, by introducing the records into evidence, invited the court to commit. A party cannot complain of error which the party has invited the court to commit. *Norwest Bank Neb. v. Bowers*, 246 Neb. 83, 516 N.W.2d 623 (1994). This assignment of error is without merit.

JURY INSTRUCTION

Next, Terry contends that the court erred in giving jury instruction No. 4 and refusing to give Terry's proposed instruction in its place.

We note that, although instruction No. 4 is included in the transcript as required by Neb. Ct. R. of Prac. 4A(2) (rev. 1992), Terry's proposed instruction is not. It is incumbent upon the party appealing to present a record which supports the errors assigned; absent such a record, the decision of the lower court will generally be affirmed. *Larsen v. First Bank*, 245 Neb. 950, 515 N.W.2d 804 (1994). Thus, we confine our analysis to the question of whether it was error for the trial court to give jury instruction No. 4.

In an appeal based on a claim of an erroneous instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *McDonald v. Miller, supra.*

Instruction No. 4 states:

> Before the plaintiff can recover against the defendant the burden is upon the plaintiff to prove by the greater weight of the evidence, each and all of the following *numbered propositions*:
>
> 1. That the defendant was negligent in *one or more* of the following *lettered particulars*:
>
> A. In failing to obtain informed consent from the plaintiff before performing the surgery.

B. In failing to properly consult and communicate with the referring physician prior to proceeding with surgery on the plaintiff.

C. In failing to take a proper history.

D. In failing to conduct a proper medical work-up on the plaintiff.

E. In failing to conduct an adequate examination of the plaintiff prior to surgery.

F. In failing to initiate a course of medical treatment prior to surgery.

G. In failing to conduct a proper radiographic work-up prior to surgery including a computerized tomographic scan (CT scan).

H. In performing unnecessary surgery.

I. In failing to conduct a proper post surgery course of treatment for the plaintiff.

2. That such negligence, if any, of the defendant was the proximate cause or a proximately contributing cause of injury to the plaintiff.

3. That as a direct and proximate result of the defendant's negligence and resultant injury, the plaintiff, Charles L. Terry, sustained damages.

4. The nature, extent and amount of the damages thus sustained by the plaintiff, Charles L. Terry.

If the plaintiff has established by the greater weight of the evidence all of *the above-numbered propositions*, then your verdict will be for the said plaintiff and against the defendant for the amount of plaintiff's damages thus sustained.

If the plaintiff has failed to establish any one or more of the foregoing *numbered propositions* by the greater weight of the evidence, your verdict will be for the defendant.

(Emphasis supplied.)

Counsel for Terry objected to instruction No. 4 at the instruction conference on the basis that it was confusing. Counsel further stated that he was objecting "to *the form of the instruction, not so much the content*. . . . [I]n the context of reading the instructions to the jury, they are going to feel that

they have to find *each and all of the foregoing propositions* and that includes the allegations of negligence." (Emphasis supplied.)

On appeal, Terry argues that (1) the language requiring the jury to differentiate between "numbered propositions" and "lettered particulars" was needlessly confusing, (2) the instruction appeared to require the jury to find Duff negligent as to all allegations before returning a verdict for Terry, and (3) a question submitted by the jury to the court regarding instruction No. 4 was demonstrative of the jury's confusion.

A jury instruction that misstates issues or defenses and has a tendency to mislead the jury is erroneous. *Wilson v. Misko*, 244 Neb. 526, 508 N.W.2d 238 (1993). However, we believe the vast majority of jurors are capable of understanding and applying the distinction between letters and numbers, and Terry has offered nothing to indicate otherwise. Terry has failed to demonstrate that he was prejudiced by the court's use of such language in instruction No. 4.

Terry's argument that the instruction appears to require the jury to find Duff negligent as to all allegations before returning a verdict for Terry is likewise specious. To the contrary, the instruction clearly instructs the jury that it may find Duff negligent if it finds that Duff did *one or more* specific acts.

A question by the jury to the court, cited by Terry as the only evidence of the jury's confusion regarding instruction No. 4, was, "Does [subsection 1.G.] ask if the defendant was negligent if he *did not* perform a C.T. scan? 'Including' is confusing in its interpretation."

Rather than answering the question directly, the trial judge modified subsection 1.G. to read: " 'In failing to obtain a computerized tomography scan (CT scan) prior to surgery.' " A journal entry by the trial judge indicated that supplemental instruction No. 1 containing the modified language was given to the jury after the parties through counsel waived the reading of the instruction in open court. The record does not reflect that Terry objected to the modified language.

Whatever confusion may have existed as to subsection 1.G. of instruction No. 4, it was apparently resolved to the satisfaction of both parties by the trial court's modification.

This incident hardly supports Terry's claim that the jury was confused by the instruction.

The meaning of an instruction and not its phraseology is the important consideration; where the meaning of an instruction is reasonably clear, it is not prejudicially erroneous. *Burns v. Metz*, 245 Neb. 428, 513 N.W.2d 505 (1994). Although there may have been a better way to draft instruction No. 4, we find the meaning of the instruction to be clear. Terry has failed in his burden to demonstrate that instruction No. 4 was either prejudicial to him or in some way affected any of his substantial rights. This assignment of error is without merit.

MOTION FOR NEW TRIAL

Although Terry assigned as error the trial court's overruling of his motion for new trial, this assignment of error is not discussed in his brief. To be considered by an appellate court, an error must be assigned and discussed in the brief of one claiming that prejudicial error has occurred. *Franksen v. Crossroads Joint Venture*, 245 Neb. 863, 515 N.W.2d 794 (1994). Therefore, this assignment of error will not be considered by this court.

CONCLUSION

Having found no merit to any of Terry's assignments of error, we affirm the order of the district court entering judgment for Duff on the jury verdict.

AFFIRMED.

ITT COMMERCIAL FINANCE, DOING BUSINESS AS TRACKER MARINE CORPORATION, APPELLEE, V. MT-KAT DISTRIBUTING, INC., A NEBRASKA CORPORATION, APPELLEE, AND MILBURN M. SARTIN, JR., AND JUDITH M. SARTIN, APPELLANTS.

519 N.W.2d 555

Filed July 29, 1994. No. S-93-008.

Rules of the Supreme Court: Depositions. The prior in- or out-of-court admissions made by a party to the pending litigation generally may be used against that party.

Appeal from the District Court for Douglas County: JOHN D. HARTIGAN, JR., Judge. Affirmed.

Steven J. Olson and Brian J. Siebken, of Liakos & Olson, for appellants.

Edith T. Peebles, of Zweiback, Hotz & Lamberty, P.C., for appellee ITT Commercial Finance.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ.

HASTINGS, C.J.

Milburn M. Sartin, Jr., and Judith M. Sartin (Sartins) appeal from a deficiency judgment rendered against them in favor of ITT Commercial Finance (ITT), doing business as Tracker Marine Corporation, on a guaranty agreement executed in connection with a loan to MT-KAT Distributing, Inc. (MT-KAT), a Nebraska corporation.

The Sartins' assignments of error combine to allege that the trial court erred in granting a deficiency judgment because of failure on the part of ITT to give proper notice of sales in accordance with Neb. U.C.C. § 9-504 (Reissue 1980) and in awarding prejudgment interest. One specific assignment of error contends that certain admissions made by the Sartins in telephone calls were improperly admitted because they were part of an offer to compromise. It is not necessary for us to deal with that assignment of error because there is other competent evidence to prove ITT's compliance with the notice rule. This case has been transferred to the docket of the Supreme Court under our authority to regulate the caseloads of the appellate

courts. We affirm.

MT-KAT was a corporation of which the Sartins were the stockholders and officers. At the request of the Sartins, two loans were made by ITT to MT-KAT in February and March 1989. MT-KAT executed and delivered to ITT an "Agreement for Wholesale Financing." As further consideration for the loans to the corporation, the Sartins executed on March 7 and delivered to ITT a written guaranty agreement guarantying the payment of all accounts of MT-KAT. The agreement was in the customary form.

Eventually, MT-KAT failed to pay its accounts, and ITT demanded that its inventory be surrendered and the accounts paid. On or about October 8, 1990, after ITT had instituted an action for replevin, MT-KAT surrendered to ITT all collateral securing its accounts.

ITT returned the inventory received from MT-KAT to the various manufacturers for credit. The record contains three separate documents entitled "Notice of Private Sale and Right to Redeem Collateral" dated October 16, 1990. Attached to these notices are return receipts for certified mail signed by the Sartins. The notices were in proper form. However, ITT failed to call anyone as a witness who was able to provide the proper foundation to testify that the notices were mailed in accordance with law.

ITT then offered portions of pretrial depositions of both Sartins which were received in evidence over their objection. In those depositions, each acknowledged that the notices found in the record were received by them. That evidence by itself, if admissible, is sufficient to show compliance with the notice section of § 9-504.

The Sartins claim their depositions were received in evidence contrary to Neb. Ct. R. of Discovery 32 (rev. 1992). Unfortunately for them, they cite a portion of the rule not applicable to this situation and fail to mention the critical rule.

Cited to us is subsection (3) of rule 32, which provides that the "deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds" generally that the witness is absent or unavailable for trial. We, the Sartins seem to say, were present throughout the trial and could

have been called, therefore you cannot use our depositions.

Having skipped over subsection (2) of the rule, the Sartins failed to recognize that "[t]he deposition of a party . . . may be used by an adverse party for any purpose." This simply codifies the well-settled rule that the prior in- or out-of-court *admissions* made by a party to the pending litigation may be used against that party. *Thoren v. Myers*, 151 Neb. 453, 37 N.W.2d 725 (1949). The deposition testimony was properly received, and there is no merit to the claim of error.

The Sartins conceded that, after allowing for all credits for returned merchandise and the net proceeds of the sale of collateral, there remained a deficiency of $29,565.60. However, they object to the additional item of $5,471 for interest and finance costs as amounting to prejudgment interest on an unliquidated disputed claim. This is not at all correct.

The "Agreement for Wholesale Financing," exhibit 3, received without objection, provides that "[d]uring each year or part of a year in which you [ITT] have extended credit to us, we [MT-KAT] will pay you finance charges on the total amount of credit extended to us in the amount agreed to between us from time to time." Exhibit 11, which was also received without objection, is the statement rendered to MT-KAT by ITT for the period ending September 30, 1990. Robert Kyle, branch manager for ITT, Tracker Marine Branch, testified as to how the charges were calculated on average daily balances and from exhibit 11 was able to compute interest and finance charges of $2,941.06 on the Mariah account, and $2,529.94 on the Tracker Marine account, for a total of $5,471. It is abundantly clear that this is contracted interest to which the creditor is entitled to recover and in no way may be considered prejudgment interest.

The judgment of the district court is correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CHRISTOPHER J. MANZER, APPELLANT.
519 N.W.2d 558

Filed July 29, 1994. No. S-93-747.

1. **Indictments and Informations: Homicide: Intent: Appeal and Error.** An information which alleges that the defendant committed second degree murder but does not allege that the act was committed with "malice" fails to allege an essential element of the crime and is plain error.
2. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion.

Appeal from the District Court for Pierce County: RICHARD P. GARDEN, Judge. Judgments on counts I and III reversed and remanded for further proceedings. Judgment on count II affirmed.

John M. Gerrard, of Gerrard, Stratton & Mapes, P.C., for appellant.

Don Stenberg, Attorney General, and J. Kirk Brown for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ.

BOSLAUGH, J.

On May 27, 1993, as the result of a plea agreement, the defendant, Christopher J. Manzer, pled guilty to second degree murder, assault in the first degree, and use of a firearm to commit a felony.

On July 29, 1993, the district court sentenced the defendant to the following terms of imprisonment: count I, second degree murder, life in prison; count II, assault in the first degree, not less than 6⅔ nor more than 20 years, to be served concurrently with the life sentence; and count III, use of a firearm to commit a felony in committing count I, not less than 6⅔ nor more than 20 years, to be served consecutively to the prior two sentences.

The defendant has appealed to this court. His sole assignment of error is that the district court erred in imposing excessive sentences. Pursuant to Neb. Ct. R. of Prac. 7B(2) (rev. 1992), the State has filed a motion for summary

affirmance.

After staying up late the night before to work on a paper for school, the defendant rose early on the morning of November 14, 1992, to do his chores at his family's farm. After that, the defendant went to his grandfather's farm near Osmond, Nebraska, and helped haul corn for the remainder of the day.

The defendant returned to his home around 5 p.m. and announced to his parents that he would be going out later that evening. He told his father, Mark Manzer, and his mother, Faye Manzer, that he was going on a date with his girl friend and that he would return home at approximately 1:30 a.m. The defendant's father told him that he should return to the house at 1 a.m.

The defendant drove to Elgin, Nebraska, and picked up his girl friend. The couple went on a double date and spent most of the evening watching television until midnight.

The defendant took his girl friend home and then began the drive to his own home. In Pierce, Nebraska, he was stopped by a police officer for running a stop sign. Upon realizing that he would now be late and arrive at about 1:20 a.m., the defendant decided to kill his family, including himself.

Upon arriving at the family farm, the defendant went to the pumphouse and obtained a 12 gauge shotgun. He then climbed the stairs to his room in an attempt to talk himself out of proceeding with the plan.

When the defendant heard his father get up and then return to bed, he approached his parents' bedroom. He fired once at his father, striking him in the cheek area. The gun then jammed, and the defendant went outside to clear the weapon. His father stumbled into the kitchen area, and the defendant reentered the house, shooting through the door and hitting his father for the second time.

The defendant then entered the kitchen, where his father lay on the floor. The defendant's 15-year-old sister walked out of one of the bedrooms on the second floor. The defendant fired, mistaking his sister for his mother and wounding his sister in the shoulder.

The defendant climbed the stairs in an attempt to find his mother. He came upon a locked room where his two younger

brothers, ages 10 and 12, and his sister were hiding. The defendant fired at the door in order to break the lock and enter the room. His brothers and sister begged the defendant to promise that he would not kill them.

The defendant instructed his sister to call a doctor for her injury; then he went outside to look for his mother, who had escaped out of the children's bedroom window. The defendant did not find his mother, and when he returned to the house, his father was regaining consciousness.

The defendant claimed that after his father called him a "fucking loser," he shot his father pointblank in the head "to put him out of his misery."

The defendant left the premises around 2 a.m. and drove around the countryside, eluding police officers. The defendant attempted to see his girl friend in Elgin. A police officer approached the defendant as he walked on foot toward his girl friend's house. At this point, the defendant turned himself in and told the authorities he was the one who had committed the murder.

The defendant was 1 month short of 18 years old when he committed the offenses. His prior offenses include just four minor traffic violations. Although the defendant was not intoxicated the night of these crimes, the defendant has a history of alcohol problems.

> In *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994), we held that malice is a necessary element of murder in the second degree and that an instruction that failed to include malice as an essential element of murder in the second degree was plain error and was prejudicial.

State v. Jones, 245 Neb. 821, 831, 515 N.W.2d 654, 659 (1994).

In the present case, the amended information, upon which the defendant was arraigned and sentenced, was worded in the language of Neb. Rev. Stat. § 28-304 (Reissue 1989) and did not allege "malice" as a specific element of the crime.

Under the rule of *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994), the failure to include malice as an element of murder in the second degree is plain error. Accordingly, the judgments on counts I and III must be reversed and the cause remanded for further proceedings.

As to count II, the State's motion for summary affirmance is sustained.

First degree assault is a Class III felony with a penalty of 1 to 20 years' imprisonment, up to a $25,000 fine, or both. The defendant was sentenced to a term of imprisonment of not less than 6 2/3 years nor more than 20 years.

A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion. *State v. Philipps*, 242 Neb. 894, 496 N.W.2d 874 (1993). The sentence for count II is within the statutory limits and under the circumstances of this case is not an abuse of discretion.

JUDGMENTS ON COUNTS I AND III REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.
JUDGMENT ON COUNT II AFFIRMED.

WRIGHT, J., dissenting.

I respectfully dissent from the majority's decision, which reversed Manzer's convictions for second degree murder and use of a firearm to commit a felony because the information upon which Manzer was convicted and sentenced did not allege malice as a specific element of the crime of second degree murder.

Manzer was originally charged by information with first degree murder, first degree assault, and two counts of use of a firearm to commit a felony. At a May 27, 1993, hearing, the district court was advised of a plea agreement. Manzer's counsel informed the court that Manzer would plead guilty to second degree murder, first degree assault, and one count of use of a deadly weapon. The court asked both Manzer and the prosecution whether this was their understanding of the plea agreement, and they answered in the affirmative. Thereafter, an amended information was filed with the court, and Manzer waived his right to the service of the amended information and his right to the reading of the amended information.

According to the court's journal entry of the proceedings, Manzer was advised of the nature of the charges and the possible penalties, including an explanation of concurrent and consecutive sentences. He was informed that he was presumed innocent until proven guilty, and his constitutional rights were

explained to him. Manzer acknowledged that he understood the nature of the charges, the possible penalties, and his constitutional rights. He also informed the court that he had had sufficient time to consult with his attorneys before proceeding.

Manzer advised the court that he wished to enter pleas of guilty and that no force, threats of force, or inducements of any kind, other than the plea agreement, were made to cause him to plead guilty. The court was then given a factual basis for the taking of the pleas. Manzer stated that he was satisfied with the representation provided by his attorneys and that he understood he was waiving his rights by pleading guilty to the offenses in the amended information.

The court accepted Manzer's pleas of guilty, finding them to be freely, voluntarily, and intelligently made with full knowledge of the nature of the charges, the possible penalties, and his constitutional rights. Manzer was adjudged guilty of the offenses of second degree murder, first degree assault, and use of a firearm to commit a felony, as alleged in the State's amended information.

From my review of the record, I find no reason to reverse the convictions for second degree murder and use of a firearm to commit a felony. The amended information charged that

> Christopher J. Manzer, late of the county aforesaid, did, on or about the 15th day of November, A.D. 1992, in the County of Pierce, and State of Nebraska aforesaid, intentionally, but without premeditation, kill Mark Manzer; and
>
> COUNT II - did then and there intentionally or knowingly cause serious bodily injury to Joy Manzer; and
>
> COUNT III - did then and there use a firearm or other deadly weapon to commit a felony which may be prosecuted in the court of this State, to wit: shotgun used in shooting Mark Manzer.

The majority has found that the amended information was insufficient because it did not include malice as an element of second degree murder.

In *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994), the court held that malice is an essential element of second degree

murder and that it was plain error for the trial court to omit the element of malice from the jury instructions defining second degree murder. Subsequently, in *State v. Grimes, ante* p. 473, 519 N.W.2d 507 (1994), and in the case at bar, the majority has held that an information which fails to include malice as an element of second degree murder is plain error requiring reversal of a defendant's conviction for second degree murder. I dissented in *State v. Grimes*, and for the reasons set forth in that dissent, I again disagree with the holding that malice is an essential element of second degree murder. I also disagree with the majority's opinion that failure to include malice in an information charging second degree murder is plain error.

Basic to procedural due process is that the party charged be notified of the charge and given a reasonable opportunity to be heard and to present any defense to the charge. See *State ex rel. Labedz v. Beermann*, 229 Neb. 657, 428 N.W.2d 608 (1988). The underlying issue presented in this case is whether Manzer was reasonably notified of the crime for which he was charged so that he had a reasonable opportunity to present a defense to the charge. Manzer's guilty plea to the charge of second degree murder was the result of an agreement in which the offense of first degree murder was reduced to second degree murder and one count of use of a firearm to commit a felony was dismissed. Manzer's sole assignment of error on appeal was that the sentences he received in connection with his guilty pleas were excessive.

Manzer acknowledged that he understood the nature of the charges, the possible penalties, and his constitutional rights. He informed the court that he had had sufficient time to consult with his attorneys before proceeding, and he advised the court that he wished to enter pleas of guilty. The court was given the factual basis that Manzer shot his father three times with a shotgun—the last time at pointblank range. Mistaking his sister for his mother, Manzer shot and wounded his sister. The court then accepted Manzer's pleas of guilty and found them to be freely, voluntarily, and intelligently made with full knowledge of the nature of the charges and the possible penalties. For these reasons, I believe the amended information, set forth in the language of the second degree murder statute, complied with

procedural due process.

In my opinion, Manzer was given reasonable notice and an opportunity to be heard and to present any defense to the charges set forth in the amended information. There is no doubt in my mind that Manzer knew the crime for which he was charged. I would, therefore, affirm the convictions and sentences of Manzer in all respects.

STATE OF NEBRASKA, APPELLEE, V. FRANK R. LADIG, ALSO KNOWN AS FRANK E. LADIG, APPELLANT.

519 N.W.2d 561

Filed July 29, 1994. No. S-93-1016.

1. **Appeal and Error.** Although an appellate court does not consider assignments of error not listed and discussed in the briefs, it always reserves the right to note plain error which was not complained of at trial or on appeal but is plainly evident from the record, and which is of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.
2. **Indictments and Informations: Homicide: Intent.** For an information to be sufficient to charge a defendant with second degree murder, the information must allege that the accused killed another purposely and maliciously.

Appeal from the District Court for Lincoln County: JOHN P. MURPHY, Judge. Reversed and remanded for further proceedings.

R. Bradley Dawson and George E. Clough, of Clough, Dawson & Piccolo, for appellant.

Don Stenberg, Attorney General, and Marilyn B. Hutchinson for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ.

PER CURIAM.

Frank R. Ladig, also known as Frank E. Ladig, was convicted of aiding and abetting second degree murder. The

district court sentenced Ladig to life in prison, ordered that he be placed in solitary confinement on four separate dates each year, and ordered him to pay restitution. He assigns as error that the district court abused its discretion in imposing an excessive sentence and in ordering solitary confinement and restitution. We reverse the judgment and remand the cause for further proceedings.

FACTS

On January 21, 1993, an information was filed in Lincoln County District Court which charged Ladig with aiding and abetting first degree murder and aiding and abetting attempted robbery in regard to the death of Richard Sterkel on July 28, 1992. Pursuant to a plea agreement, an amended information was filed on September 16, 1993, which charged Ladig with aiding and abetting second degree murder.

The plea agreement, which was stated for the record, required that Ladig enter a no contest plea to aiding and abetting second degree murder and that he testify in the trial of Darrin McHenry, who was charged with first degree murder in Sterkel's death. The agreement provided that a sexual assault charge would not be filed against Ladig in Dawson County. With regard to sentencing, the plea agreement provided that the State could request that Ladig be sentenced to life in prison.

The amended information stated that "on or about July 28, 1992, [Ladig] did aid, abet, procure or cause another to intentionally, but without premeditation, kill Richard Sterkel" in Lincoln County, Nebraska. The amended information did not allege that Ladig's actions were taken purposely and maliciously.

The court accepted the plea, finding that there was a factual basis for the plea and that the plea was made knowingly, voluntarily, and intelligently. The court found Ladig guilty of aiding and abetting second degree murder, based on the evidence in the trial of McHenry. A Class I presentence investigation was ordered.

At the sentencing hearing, the State requested the imposition of a life sentence with solitary confinement and restitution. Ladig informed the court that he had nothing to say before

sentence was passed. The court opined that all three defendants involved in the death were equally culpable. The court then sentenced Ladig to life in prison and ordered Ladig to pay restitution, jointly and severally with the other two defendants, in the amount of $4,653.77. The court ordered Ladig to pay the court costs, but found them to be uncollectible. Ladig was not given credit for time served because there was no term to the sentence.

ANALYSIS

The amended information upon which Ladig was convicted and upon which his plea of no contest was entered was worded in the language of Neb. Rev. Stat. § 28-304 (Reissue 1989) and did not allege malice as a specific element of the crime.

In *State v. Myers*, 244 Neb. 905, 907, 510 N.W.2d 58, 62 (1994), we stated, "[I]t was plain error to omit the element of 'malice' from the jury instructions defining second degree murder," and we reversed Myers' conviction for second degree murder and granted him a new trial.

On appeal, Ladig does not assign as error the failure of the information to include malice in the charge. Although an appellate court does not consider assignments of error not listed and discussed in the briefs, it always reserves the right to note plain error which was not complained of at trial or on appeal but is plainly evident from the record, and which is of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process. *Id.* In this case, we note plain error because of the failure of the information to include the element of malice.

In *State v. Grimes, ante* p. 473, 519 N.W.2d 507 (1994), the information charging Craig T. Grimes omitted malice from the charge. We held that for an information to be sufficient to charge a defendant with second degree murder, the information must allege that the accused killed another purposely and maliciously.

In *State v. Manzer, ante* p. 536, 519 N.W.2d 558 (1994), Christopher J. Manzer, as the result of a plea agreement, pled guilty to second degree murder, assault in the first degree, and use of a firearm to commit a felony. On appeal to this court,

Manzer's sole assignment of error was the excessiveness of his sentences. In reversing his conviction for second degree murder, we held: "[T]he failure to include malice as an element of murder in the second degree is plain error." *Id.* at 538, 519 N.W.2d at 559.

Accordingly, the judgment of conviction, the sentence, and the order for restitution must be reversed, and the cause is remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WRIGHT, J., dissenting.

I respectfully dissent from the majority's decision, which reversed the judgment of conviction of aiding and abetting second degree murder and remanded the cause for further proceedings.

On January 21, 1993, an information was filed in Lincoln County District Court which charged Ladig with aiding and abetting first degree murder and aiding and abetting attempted robbery in regard to the death of Richard Sterkel on July 28, 1992. Pursuant to a plea agreement, an amended information was filed on September 16, 1993, which charged Ladig with aiding and abetting second degree murder.

Ladig waived his right to wait 24 hours before entering a plea to the charge stated in the amended information and appeared before the court with his attorney on September 16, 1993. The amended information stated that on or about July 28, 1992, Ladig did aid, abet, procure, or cause another to intentionally, but without premeditation, kill Sterkel in Lincoln County, Nebraska. The court informed Ladig that second degree murder was a Class IB felony punishable by a minimum of 10 years' imprisonment and a maximum of life imprisonment and that the sentence imposed had to be within the range of 10 years to life. Ladig stated that he understood.

The court advised Ladig that by entering a plea of no contest, he waived the right to have a speedy and public trial before a jury, the right to see and hear all of the witnesses called to testify against him and to cross-examine such witnesses, and the right to call his own witnesses and present evidence. He was also advised that he had the right to refuse to testify, that he was presumed innocent, and that such presumption remained with

him throughout the trial until the State proved him guilty.

The court informed Ladig that by entering a plea of no contest, he would be giving up any defenses or challenges that he might have to the admissibility of any statements made by him or to the evidence presented. Ladig indicated that he understood. The court then asked Ladig whether he had discussed his plea with his attorney, whether he was satisfied with his attorney's representation, and whether his rights had been explained to him. Ladig answered yes to these questions. The court noted:

> Aiding, abetting, procuring or causing in the State of Nebraska means that if you helped, hired or were involved in the killing of Richard Sterkel with the other person, then you, as an aider or abettor, are just as guilty as if you had done it yourself. Do you understand that?

Ladig answered yes and entered a plea of no contest to the amended information. The court accepted as a factual basis the evidence the court heard in the trial of Ladig's codefendant Darrin McHenry.

The court then inquired whether anyone had threatened Ladig in any manner to get him to enter the plea, had promised him leniency other than the plea agreement, had kept food or water from him, or had kept him in solitary confinement in order to make him enter his plea. Ladig responded in the negative.

The court accepted the plea, finding that there was a factual basis for the plea and that the plea was made knowingly, voluntarily, and intelligently. The court found Ladig guilty of aiding and abetting the second degree murder of Sterkel, based on the evidence in the trial of McHenry. A Class I presentence investigation was ordered.

At the sentencing hearing, the court sentenced Ladig to life in prison, finding that all three defendants involved in Sterkel's death were equally culpable. As a part of the sentence, the court ordered Ladig to be placed in solitary confinement for 4 days each year. The court also ordered Ladig to pay restitution for the costs of Sterkel's burial. On appeal, Ladig asserted that the district court abused its discretion by sentencing Ladig to life imprisonment, by ordering that Ladig be placed in solitary

confinement for 4 days each year, and by ordering that Ladig pay restitution to Sterkel's family.

For the reasons set forth in my dissents in *State v. Grimes, ante* p. 473, 519 N.W.2d 507 (1994), and *State v. Manzer, ante* p. 536, 519 N.W.2d 558 (1994), I would affirm Ladig's conviction for aiding and abetting second degree murder. I can find no basis for reversing Ladig's conviction because the amended information did not say that he maliciously committed the crime with which he was charged, to which he pled no contest, and for which he was subsequently convicted.

ROBERT S. LONG, M.D., APPELLANT, V. ROBERT J. HACKER, M.D., APPELLEE.

520 N.W.2d 195

Filed August 5, 1994. No. S-91-1207.

1. **Jury Instructions.** A trial court must eliminate all matters not in dispute and submit to the jury only the controverted questions of fact upon which the verdict must depend.
2. _____. Jury instructions should be confined to the issues presented by the pleadings and supported by the evidence.
3. **Jury Instructions: Appeal and Error.** A jury instruction which misstates the issues and has a tendency to confuse the jury is erroneous.
4. **Jury Instructions.** It is more than mere probability that an instruction on a matter not an issue in the litigation distracts a jury in its effort to answer legitimate, factual questions raised during trial.
5. **Appeal and Error.** Generally, an appellate court will dispose of a case on the theories which were presented to the trial court.
6. **Jury Instructions: Appeal and Error.** The instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating a reversal.
7. _____: _____. Failure to object to a jury instruction after it has been submitted to counsel for review precludes raising an objection on appeal absent plain error.
8. **Appeal and Error: Words and Phrases.** Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to

leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.

9. **Appeal and Error.** Plain error may be asserted for the first time on appeal or be noted by the appellate court on its own motion.
10. **Malpractice: Physicians and Surgeons: Independent Contractor: Negligence: Liability: Words and Phrases.** The duty of care owed by a physician is nondelegable, which means that an employer of an independent contractor, by assigning work consequent to a duty, is not relieved from liability arising from the delegated duties negligently performed. As a result of a nondelegable duty, the responsibility or ultimate liability for proper performance of a duty cannot be delegated, although actual performance of the task required by a nondelegable duty may be done by another.
11. **Jury Instructions.** The trial court, whether requested or not, has a duty to instruct the jury on issues presented by the pleadings and the evidence.
12. **Negligence.** The doctrine of res ipsa loquitur is that the accident and resulting injuries are such that in the ordinary course of things the accident does not happen if those who have the exclusive management or control of the instrumentality or the agency proximately causing such accident or injuries use proper care.
13. _____. When applicable, the essence of the doctrine of res ipsa loquitur is that an inference of negligence arises without further proof and that the facts speak for themselves.
14. _____. If specific acts of negligence are alleged or there is direct evidence of the precise cause of the accident, the doctrine of res ipsa loquitur is not applicable. The doctrine is applicable only where the plaintiff is unable to allege or prove the particular act of negligence which caused the injury.
15. **Negligence: Presumptions.** An unsuccessful attempt on the part of the plaintiff to show the specific negligent act which caused his injury does not weaken or displace the presumption of negligence on the part of the defendant arising from the facts of the case by virtue of the rule of res ipsa loquitur.
16. **Negligence.** The introduction of some evidence which tends to show the specific acts of negligence on the part of the defendant, but which does not purport to furnish full and complete explanation of the occurrence, does not destroy the inferences which are consistent with the evidence and so does not deprive the plaintiff of the benefit of res ipsa loquitur.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, and HANNON and MILLER-LERMAN, Judges, on appeal thereto from the District Court for Douglas County, PAUL J. HICKMAN, Judge. Judgment of Court of Appeals reversed, and cause remanded for a new trial.

Steven J. Riekes and Kevin R. Hopp, of Richards, Riekes, Brown & Zabin, P.C., for appellant.

Patrick G. Vipond, David J. Schmitt, and Raymond E. Walden, of Kennedy, Holland, DeLacy & Svoboda, for appellee.

HASTINGS, C.J., WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ.

LANPHIER, J.

Plaintiff-appellant, Robert S. Long, M.D., brought a medical malpractice action against defendant-appellee, Robert J. Hacker, M.D., a neurosurgeon, in the district court for Douglas County. Hacker had performed a laminectomy on Long, and it is uncontested that Hacker operated on the wrong vertebrae of Long's spine. This miscalculation was apparently due to the misinterpretation of an x ray. The jury found in favor of Hacker. The Nebraska Court of Appeals affirmed the judgment of the district court. *Long v. Hacker*, 93 NCA No. 42, case No. A-91-1207 (not designated for permanent publication). Long filed a petition for further review by this court on several grounds. Long contends that the Court of Appeals erred in finding (1) that the instructions to the jury on alternative methods of surgical procedure were properly given, since alternative procedures to locate the operation site were not in issue; (2) that the trial court properly instructed on "efficient intervening cause," since the surgeon was responsible for any misreading of x rays by the radiologist; and (3) that the verdict was not clearly wrong. We reverse, and remand the cause for a new trial.

FACTS

In October 1987, Long experienced a sudden onset of severe back and leg pain. Long first met with Hacker, a neurosurgeon, in December 1987. Hacker diagnosed Long with spinal stenosis and nerve root entrapment. Spinal stenosis is a narrowing of the spinal canal which can eventually cause pressure on the nerve roots. Nerve root entrapment is the squeezing of the nerve root as it comes out of the spine.

Hacker initially performed a diskectomy, which failed to provide significant relief from the pain. Hacker recommended that Long undergo a laminectomy. In a laminectomy, bony

elements of the component parts of the vertebrae, i.e., spinous processes, facets, and laminae, are removed. The laminectomy was to be performed at the L4-5 level, i.e., the segment of the spine located between the fourth and fifth lumbar vertebrae. The surgery was performed on January 14, 1988. It is uncontroverted that Hacker operated at the L3-4 level of Long's spine, rather than at L4-5 as intended.

According to the record, the procedures used by Hacker to localize the appropriate level at which to operate were as follows: Hacker approximated the correct level at which L4-5 would be found by locating anatomical landmarks such as scars from the diskectomy and puncture marks from a myelogram. Hacker made an incision at the spinal area approximated as L4-5, where he visually checked for abnormalities and probed the structures with his finger. Thereafter, a needle was placed at what Hacker believed to be the L4-5 level and an x ray was taken of that area. The purpose of this procedure is to ensure, before any important spinal structures are removed, that the surgeon is indeed at the appropriate level of the spine. The needle in the x ray serves as a reference landmark in relation to the desired area of the spine to be operated upon.

After the x ray was processed, it was taken to the operating room by an x-ray technician and placed on a view box. Hacker found the x ray too dark to allow him to see the structures he needed to see in order to localize the operative site. Hacker stated " 'That film's awfully dark' " and asked " 'Where are we?' " An x-ray technician then responded, " 'The radiologist says you're at [L]4-5.' " Based upon that statement by the technician, Hacker then performed the laminectomy at what proved to be L3-4.

After the surgery, Long continued to suffer from back pain. Subsequently, he discovered the operation had been performed at the L3-4 level, rather than at the intended L4-5. Long initiated a medical malpractice action against Hacker in the district court. The jury found in favor of Hacker. The Court of Appeals affirmed the district court's judgment in favor of Hacker. We granted Long's petition for further review.

ASSIGNMENTS OF ERROR

Long claims the Court of Appeals erred in finding that (1) the instructions to the jury on alternative methods of surgical procedure were properly given, (2) the trial court properly instructed on efficient intervening cause, and (3) the verdict was supported by sufficient evidence.

ALTERNATIVE METHODS

Long first claims that the Court of Appeals' finding that the jury instructions on alternative methods of surgical procedure were proper is in error. The questioned instruction on alternative methods of surgical procedures stated:

> If, among physicians in the community or similar communities more than one method of procedure is recognized as proper, it is not negligence for a doctor to follow a certain method if the method actually employed was one of several which met the required standard of care. However, it is negligence if the method actually employed by the doctor failed to meet the required standard of care.

Long argues that the instruction erroneously implies that more than one method of localization was at issue, when in fact, the only issue was whether Hacker met the required standard of care in implementing the particular method chosen. The Court of Appeals found that the instruction properly stated the law and "clearly indicates that, when choosing among a number of alternative methods, a physician must meet the required standard of care in his or her performance of the method selected." *Long v. Hacker*, 93 NCA No. 42 at 30, case No. A-91-1207 (not designated for permanent publication). We believe the Court of Appeals was wrong in this assertion.

The Court of Appeals cited *Watson v. McNamara*, 229 Neb. 1, 424 N.W.2d 611 (1988), in making its determination. *Watson* involved a medical malpractice action in which the plaintiff claimed that the defendant negligently failed to determine the plaintiff's fetal age, resulting in the plaintiff's premature birth. At issue was a jury instruction similar to the one at issue in this case. The plaintiff's main contention in that case was that the defendant breached the applicable standard of care by failing to

use various methods available to him for determining fetal age. This court stated that a physician is not negligent for simply choosing one recognized method of diagnosis over another, as long as the method chosen conformed with the standard of care. In *Watson*, the issue was whether the method chosen by the defendant from alternative methods available conformed with the standard of care.

In the instant case, Long did not plead, present evidence, or argue that Hacker chose the wrong medical procedure to localize the area to be operated upon. Rather, Long's claim is that Hacker failed to meet the standard of care in the performance of the chosen method.

A trial court must eliminate all matters not in dispute and submit to the jury only the controverted questions of fact upon which the verdict must depend. *Kluender v. Mattea*, 214 Neb. 327, 334 N.W.2d 416 (1983). Jury instructions should be confined to the issues presented by the pleadings and supported by the evidence. *Bump v. Firemens Ins. Co.*, 221 Neb. 678, 380 N.W.2d 268 (1986).

The trial court erred in giving the instruction on alternative methods of localization to the jury. It was not a controverted issue in the case.

We have held that a jury instruction which misstates the issues and has a tendency to confuse the jury is erroneous. *Danner v. Myott Park, Ltd.*, 209 Neb. 103, 306 N.W.2d 580 (1981). As we noted in *Bump*, "It is more than mere probability that an instruction on a matter not an issue in the litigation distracts a jury in its effort to answer legitimate, factual questions raised during trial." 221 Neb. at 690, 380 N.W.2d at 277.

The Court of Appeals found that because evidence was submitted at trial regarding the existence of alternative methods of localization, the instruction was proper. However, alternative methods were not in dispute. The record discloses that the issue, to the extent it was raised, was done so by Hacker, not Long. At trial, the deposition of Long's expert, Dr. Arthur White, was admitted into evidence. On cross-examination, Dr. White was asked whether he had stated in some of his writings that there was no right way to perform spine surgery. On

redirect, Dr. White described several methods of localization, in order to explain his statement made on cross-examination. No testimony regarding which method was best was elicited from Dr. White, nor was such testimony presented anywhere else in the evidence. Under these facts, it was error for the trial court to instruct the jury on alternative methods of surgery. Because the instruction could mislead the jury about the issues in the case, the instruction was prejudicial.

EFFICIENT INTERVENING CAUSE

Long next claims that the Court of Appeals erred in finding the trial court properly instructed the jury on efficient intervening cause. During the instruction conference, Long objected to instruction No. 13, which related to issues of legal causation. The instruction included definitions of proximate cause, proximate result, efficient intervening cause, and reasonable care. Long's objection was stated as follows:

> [Plaintiff's counsel]: Thirteen is cumulative and an unfair emphasis on the duty of the plaintiff to prove negligence. It defines reasonable care the plaintiff is required to prove. And I'm referring to Instruction No. 13 at this time. I object to it for that reason. When we find Instruction No. 6 a definition of the standard of care in a medical malpractice case. No. 7 is a discussion of negligence and its meaning. No. 8, there's discussion of negligence for doctors and there are requirements to be followed —
>
> THE COURT: Which one are you objecting to?
>
> [Plaintiff's counsel]: I'm objecting to No. 13.
>
> THE COURT: Let's see what you're talking about.
>
> [Plaintiff's counsel]: Specifically the last paragraph thereof.
>
> [Defendant's counsel]: What's it say? Well, I would have no objection to eliminating that paragraph since it's been discussed already.
>
> THE COURT: Overruled. It will remain. Seems to me that if you're going to define negligence, proximate cause, proximate result, and you talk about reasonable care that a doctor has to take, you ought to tell them what the hell

reasonable care is. I've done it. If you don't like it, it's too bad.

Long objected to the reasonable care portion of instruction No. 13, not the definition of efficient intervening cause. Generally, an appellate court will dispose of a case on the theories which were presented to the trial court. *Central States Resources v. First Nat. Bank*, 243 Neb. 538, 501 N.W.2d 271 (1993). *Municipal Energy Agency of Neb. v. City of Cambridge*, 230 Neb. 61, 430 N.W.2d 44 (1988).

The definition of reasonable care which Long objected to provides that reasonable or ordinary care "is that amount or degree of care which ordinary prudence and a proper regard for one's safety and the safety of others would require under the circumstances shown in the evidence." The instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating a reversal. *Vredeveld v. Clark*, 244 Neb. 46, 504 N.W.2d 292 (1993). Instruction No. 13's definition of reasonable care is correct, was not cumulative, and did not constitute undue prejudice to Long. See *Good v. Jones*, 184 Neb. 454, 168 N.W.2d 520 (1969). Therefore, the instruction was proper, given the lack of objection.

As noted, Long's objection at the hearing was directed to the reasonable care definition. On appeal, Long challenges the section which refers to efficient intervening cause. We have ruled that failure to object to a jury instruction after it has been submitted to counsel for review precludes raising an objection on appeal absent plain error. *Humphrey v. Nebraska Public Power Dist.*, 243 Neb. 872, 503 N.W.2d 211 (1993). Therefore, absent plain error, Long cannot raise the issue for the first time on appeal that the efficient intervening cause definition was improper.

Plain error exists where there is an error, plainly evident from the record but not complained of at trial, which prejudicially affects a substantial right of a litigant and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process. Plain error may be asserted for the first

time on appeal or be noted by the appellate court on its own motion. *Id.*; *Katskee v. Nevada Bob's Golf of Neb.*, 238 Neb. 654, 472 N.W.2d 372 (1991).

The instruction on efficient intervening cause was plain error because of our prior decisions in medical malpractice claims, where we held that a head surgeon is ultimately liable for the negligent acts or omissions of others who are assisting in the surgery. See, *Burns v. Metz*, 245 Neb. 428, 513 N.W.2d 505 (1994); *Swierczek v. Lynch*, 237 Neb. 469, 466 N.W.2d 512 (1991).

In *Swierczek*, we reversed the dismissal of a res ipsa loquitur claim by a patient against an operating oral surgeon, a physician, an anesthesiologist, a nurse anesthetist, and a hospital. The plaintiff in that case was operated upon to remove all her teeth, and she awoke with ulnar neuropathy injuries, causing pain in her hands.

In *Swierczek*, we stated:

> The hospital and surgeon cannot escape liability by attempting to delegate the responsibility for activity in the operating room to the anesthesiologist or other staff present there. The duty of care owed by a physician is nondelegable, which "means that an employer of an independent contractor . . . by assigning work consequent to a duty, is not relieved from liability arising from the delegated duties negligently performed. [Citation omitted.] As a result of a nondelegable duty, the responsibility or ultimate liability for proper performance of a duty cannot be delegated, although actual performance of the task required by a nondelegable duty may be done by another." *Foltz v. Northwestern Bell Tel. Co.*, 221 Neb. 201, 213, 376 N.W.2d 301, 309 (1985). In plain language, the law ordinarily does not permit a tort-feasor to escape liability by the act of attempting to transfer responsibility for a nondelegable duty to an independent contractor.

237 Neb. at 482, 466 N.W.2d at 520.

All of the testifying medical experts, as well as Hacker himself, agreed that it is a fundamental and nondelegable duty of an operating surgeon to localize the operative site of the

patient. Hacker contends that he acted within the requisite standard of care by relying on the radiologist's interpretation of the x ray.

The district court instructed the jury on the definition of efficient intervening cause. This definition stated in part:

> "Efficient intervening cause" is a new and independent act, itself a proximate cause of an injury, which breaks the causal connection between the original wrong and the injury. A person is not legally responsible for an injury if it would not have resulted but for the interposition of an efficient intervening cause, which he should not have reasonably anticipated.

The instruction on efficient intervening cause is improper because Hacker, as head surgeon, *is* ultimately responsible for any negligent acts or omissions on behalf of himself or the operating team. Hacker might have been negligent in his acts or omissions. The radiologist might have been negligent in his acts or omissions. It is irrelevant in what sequence these negligent acts or omissions might have occurred, because Hacker is ultimately liable for the negligence. Hacker may not escape liability by presenting the negligence of another as an efficient intervening cause.

Therefore, with regard to Hacker and the radiologist, the instruction on efficient intervening cause was improper and should not have been given. The trial court, whether requested or not, has a duty to instruct the jury on issues presented by the pleadings and the evidence. *Burns v. Metz*, 245 Neb. 428, 513 N.W.2d 505 (1994). The jury should have been instructed that Hacker, as head surgeon, was ultimately liable for the negligent acts or omissions of his assistants in the operation, as well as his own negligent acts or omissions.

We note one of Hacker's defenses was that Long's injuries and damages were due to the actions of nonparties. Evidence was presented at trial that subsequent to Hacker's surgery, one Dr. Spil operated on the L4-5 area of Long. Hacker presented evidence to support the contention that Dr. Spil's operation was the cause of Long's present injuries and that, therefore, it was not Hacker's operation that caused the ongoing problems of Long.

However, the instruction on efficient intervening cause excludes causes which could be reasonably anticipated. After Hacker operated on the incorrect level of Long's spine, it would be reasonable to anticipate Long would require another operation at the correct level to address the problem Hacker was to operate on. Thus, the subsequent operation was reasonably anticipated and not an intervening cause within the definition of the proposed instruction.

RES IPSA LOQUITUR

This appears to be a fact situation where res ipsa loquitur would apply. The doctrine of res ipsa loquitur is that the accident and resulting injuries are such that in the ordinary course of things the accident does not happen if those who have the exclusive management or control of the instrumentality or the agency proximately causing such accident or injuries use proper care. *Swierczek v. Lynch*, 237 Neb. 469, 466 N.W.2d 512 (1991); *McCall v. St. Joseph's Hospital*, 184 Neb. 1, 165 N.W.2d 85 (1969). When applicable, the essence of the doctrine is that an inference of negligence arises without further proof and that the facts speak for themselves. *Beatty v. Davis*, 224 Neb. 663, 400 N.W.2d 850 (1987); *McCall v. St. Joseph's Hospital, supra*; *Security Ins. Co. v. Omaha Coca-Cola Bottling Co.*, 157 Neb. 923, 62 N.W.2d 127 (1954).

In *McCall v. St. Joseph's Hospital*, 184 Neb. at 5, 165 N.W.2d at 88, we stated:

> As applied to hospital and malpractice cases, perhaps the best analysis of the evidence necessary to sustain an action for res ipsa loquitur is the case of Horner v. Northern Pacific Beneficial Assn. Hospitals, Inc., 62 Wash. 2d 351, 382 P. 2d 518. In that case the court stated as follows: ". . . [N]egligence may then be inferred in three situations without affirmative proof thereof: (1) When the act causing the injury is so palpably negligent that it may be inferred as a matter of law, i.e., leaving foreign objects, sponges, scissors, etc., in the body, or amputation of a wrong member; (2) when the general experience and observation of mankind teaches that the result would not be expected without negligence; and (3) when proof by

> experts in an esoteric field creates an inference that negligence caused the injuries."

In the instant case, Long underwent an operation on the intended L4-5 level of his spine. Subsequently, he discovered Hacker in fact operated on, and removed structures at, the L3-4 level of his spine. The operation on the wrong area of the spine in the ordinary course of things would not have happened if each of those having charge of the operation used proper care. The surgeon is ultimately responsible.

However, in Nebraska it is clear that if specific acts of negligence are alleged or there is direct evidence of the precise cause of the accident, the doctrine of res ipsa loquitur is not applicable. *Beatty v. Davis, supra.* See, *Lund v. Mangelson*, 183 Neb. 99, 158 N.W.2d 223 (1968); *Security Ins. Co. v. Omaha Coca-Cola Bottling Co., supra.* The doctrine is applicable only where the plaintiff is unable to allege or prove the particular act of negligence which caused the injury. *Id.*

An unsuccessful attempt on the part of the plaintiff to show the specific negligent act which caused his injury does not weaken or displace the presumption of negligence on the part of the defendant arising from the facts of the case by virtue of the rule of res ipsa loquitur. *Id.* It is quite generally agreed that the introduction of some evidence which tends to show the specific acts of negligence on the part of the defendant, but which does not purport to furnish full and complete explanation of the occurrence, does not destroy the inferences which are consistent with the evidence and so does not deprive the plaintiff of the benefit of res ipsa loquitur. *Nuclear Corporation of America v. Lang*, 480 F.2d 990 (8th Cir. 1973) (interpreting the doctrine as applied in Nebraska law).

However, Long's petition alleged that Hacker was negligent as defined by Neb. Rev. Stat. § 44-2810 (Reissue 1988) of the Nebraska Hospital-Medical Liability Act, in the following respects:

> (1) In failing to perform all reasonable and necessary act[s] which would have enabled him to locate the L4-5 level of the Plaintiff's spine before he performed the said operative procedure;
>
> (2) In failing to obtain a readable intraoperative x-ray;

(3) In failing to interpret an intraoperative x-ray;

(4) In operating upon the L3-4 level of Plaintiff's spine instead of the L4-5 level of his spine . . . .

While these are specific acts of negligence pled which might foreclose res ipsa loquitur, we note the record shows that these specific acts were only pled in a third amended petition as a result of an order to make more definite and certain. The earlier pleading contained general allegations of negligence which would not foreclose res ipsa loquitur. Because it appears likely the issue will arise again, we have addressed the issue of res ipsa loquitur in the interests of judicial economy. See *Calvert v. Roberts Dairy Co.*, 242 Neb. 664, 496 N.W.2d 491 (1993).

CONCLUSION

In conclusion, the jury instruction regarding alternative methods was erroneous. The jury instruction on efficient intervening cause was plain error. The district court's failure to instruct the jury properly on these issues was so basic to the cause of action that such error requires a new trial. See *Enyeart v. Swartz*, 218 Neb. 425, 355 N.W.2d 786 (1984). We need not address Long's third assignment of error.

REVERSED AND REMANDED FOR A NEW TRIAL.

BOSLAUGH, J., participating on briefs.

ANTHONY J. SINDELAR, APPELLEE AND CROSS-APPELLANT, V. CANADA TRANSPORT, INC., A NEBRASKA CORPORATION, AND CENTRAL TRANSPORTATION COMPANY, INC., A NEBRASKA CORPORATION, APPELLANTS AND CROSS-APPELLEES.

520 N.W.2d 203

Filed August 5, 1994. No. S-92-737.

1. **Federal Acts: Employer and Employee: Pensions.** An employer's decision to extend benefits does not constitute, in and of itself, the establishment of a federal Employee Retirement Income Security Act plan. The pivotal inquiry is whether the plan requires the establishment of a separate, ongoing administrative scheme to administer the plan's benefits. Simple or mechanical determinations do not necessarily require the establishment of such an

administrative scheme; rather, an employer's need to create an administrative system may arise where the employer, to determine the employees' eligibility for and level of benefits, must analyze each employee's particular circumstances in light of the appropriate criteria.

2. **Rules of Evidence: Appeal and Error.** The admissibility of evidence is reviewed for abuse of discretion where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court.
3. **Jury Instructions: Appeal and Error.** All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating a reversal.
4. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on the claim of an erroneous instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
5. **Employer and Employee: Wages: Attorney Fees.** Amounts payable to an employee as deferred compensation are "wages" subject to the additional amounts to be allowed as attorney fees under Neb. Rev. Stat. § 48-1231 (Cum. Supp. 1992).

Appeal from the District Court for Madison County: RICHARD P. GARDEN, Judge. Affirmed as modified.

Patrick J. Barrett, of McGrath, North, Mullin & Kratz, P.C., and James F. Brogan for appellants.

T. Randall Wright and Jill R. Griffee Ross, of Dixon & Dixon, P.C., for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ.

BOSLAUGH, J.

The appellee and cross-appellant, Anthony J. Sindelar, filed suit against the appellants and cross-appellees, Canada Transport, Inc., and Central Transportation Company, Inc. (the companies), to recover the cash value of a life insurance policy. Sindelar alleged that the cash value of the policy, which was purchased by the companies on Sindelar's life, was to be paid to him at the time he left the employment of the companies. The district court for Madison County entered judgment on a jury verdict for Sindelar in the amount of $111,745. Both parties appeal.

Sindelar began working with the companies in

approximately 1970. He advanced to the position of president and general manager, and in 1979, the companies purchased a split-dollar life insurance policy on his life. The policy provided that upon Sindelar's death, the companies and Sindelar's appointed beneficiary would split the death benefits. The parties alleged different facts regarding the purchase of the policy and the meetings that were held in conjunction with the purchase.

Sindelar alleged that the parties had agreed that if the death benefit was not claimed, the cash value of the policy would be paid to him when his term of employment ended. Sindelar claimed to have been informed of the terms of the payment plan during a meeting in 1979. Sindelar claimed that the people at the meeting—Paul Abler, the owner of the companies; Jim Bradford, the insurance agent; and Sindelar—discussed retirement benefits and deferred compensation plans. Sindelar also claimed that he was later given a folder of materials explaining the benefits of the policy. The companies alleged that the cash value of the policy was never meant to go to Sindelar and that the insurance materials were never officially distributed to him.

Sindelar offered the companies' annual financial reports from 1982 through 1986 as proof of the companies' intent to provide him with a retirement benefit. Those reports each included a paragraph which stated that the companies and Sindelar had entered into a deferred compensation agreement which would grant Sindelar the cash value of the policy when his employment terminated. The companies claimed that those statements were printed in error. The companies explained that Abler and Bradford had discussed the possibility of using the insurance policy as a deferred compensation plan and that Bradford had sent Abler a draft of such a plan. The companies claimed, however, that the draft, which was never signed, was forwarded to the companies' accountants for review and was mistakenly added to the financial statements.

The parties also recount different stories regarding loans taken against the policy. Sindelar claims that when the companies borrowed money against the policy, Abler assured him that the money would be repaid. Abler, testifying for the

companies, stated that he told Sindelar only that the death benefit would not change as a result of the loan.

Sindelar's employment with the companies ended in December 1989. The companies surrendered the policy in May 1990 and collected the cash value of the policy less the value of the previous loans. This action was commenced in September of the same year.

Sindelar brought three causes of action, under the theories of (1) breach of an oral and written contract, (2) promissory estoppel, and (3) violation of the Nebraska Wage Payment and Collection Act. The trial judge dismissed the second cause of action as duplicative of the first cause of action and the third as inapplicable because the payment did not constitute the payment of wages under the act. In response to a motion by the companies, the trial judge found that the first cause of action was not preempted by the federal Employee Retirement Income Security Act (ERISA) (codified at 29 U.S.C. §§ 1001 through 1461 (1988)). After a trial, a jury rendered a verdict for Sindelar in the amount of $111,745, which was entered by the trial court.

The companies allege as error, in summary, the failure of the trial court (1) to dismiss the case as preempted by ERISA, (2) to deny Sindelar's motion in limine regarding the terms of the unsigned deferred compensation agreement, (3) to give proper jury instructions regarding contract law, and (4) to give proper jury instructions regarding damages.

Sindelar cross-appeals the trial court's finding that the payment of the cash value of the policy was not the payment of wages under the Nebraska Wage Payment and Collection Act.

We will address the ERISA question first as a jurisdictional matter. ERISA applies to an " 'employee benefit plan,' " which includes an "employee welfare benefit plan." § 1002(3). An "[e]mployee welfare benefit plan," as defined by ERISA, includes "any plan, fund, or program . . . established or maintained . . . for the purpose of providing [various specified benefits] for its participants . . . through the purchase of insurance or otherwise." § 1002(1). Severance benefits are included in those specified benefits. *Kulinski v. Medtronic Bio-Medicus, Inc.*, 21 F.3d 254 (8th Cir. 1994).

The existence of an ERISA plan is a mixed question of fact

and law, and is reviewed de novo. *Id.* In *Kulinski*, 21 F.3d at 256-57, the U.S. Court of Appeals for the Eighth Circuit defined the limits of the scope of ERISA as follows:

> An employer's decision to extend benefits does not constitute, in and of itself, the establishment of an ERISA plan. [Citation omitted.] Instead, *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 107 S.Ct. 2211, 96 L.Ed.2d 1 (1987), and its progeny have delineated the standard to be applied to determine whether a benefits plan falls within ERISA's ambit: The pivotal inquiry is whether the plan requires the establishment of a separate, ongoing administrative scheme to administer the plan's benefits. Simple or mechanical determinations do not necessarily require the establishment of such an administrative scheme; rather, an employer's need to create an administrative system may arise where the employer, to determine the employees' eligibility for and level of benefits, must analyze each employee's particular circumstances in light of the appropriate criteria.

The court in *Kulinski* cited the decisions of other circuits which stated that one-time lump-sum severance payment plans were not governed by ERISA. See, *Fontenot v. NL Industries, Inc.*, 953 F.2d 960 (5th Cir. 1992); *Angst v. Mack Trucks, Inc.*, 969 F.2d 1530 (3d Cir. 1992). The *Kulinski* court determined that a " 'golden parachute' " agreement did not constitute an ERISA plan because the terms of the agreement did not require the establishment of an ongoing administrative scheme. 21 F.3d at 254. The court stated that once the benefit had been triggered, "there was nothing for the company to decide, no discretion for it to exercise, and nothing for it to do but write a check." 21 F.3d at 258.

Whether the cash value payment in this case is a severance payment or a deferred compensation agreement, we will apply the standard expressed in *Kulinski*. Applying that standard to the facts of this case, we find that ERISA does not govern the plan or preempt the cause of action. According to Sindelar, the agreement provided that he would receive the cash value of the insurance policy at the end of his term of employment. No administrative scheme was necessary for the benefit to be paid;

the companies needed only to write a check. The trial court properly exercised jurisdiction over this matter.

The companies also allege that the trial court erred in granting Sindelar's motion in limine to exclude from evidence the terms of the unsigned deferred compensation agreement. The document was referred to by Sindelar for the purpose of showing that a deferred compensation agreement had been discussed. The admissibility of evidence is reviewed for abuse of discretion where the Nebraska Evidence Rules commit the evidentiary question at issue to the discretion of the trial court. *Behm v. Northwestern Bell Tel. Co.*, 241 Neb. 838, 491 N.W.2d 334 (1992).

The agreement contained language which would have limited Sindelar's ability to work for competing businesses. The companies contend that they would not have entered into a deferred compensation arrangement without a noncompetition clause and that the terms of the agreement would support that argument. The companies also claim that the introduction of the terms of the agreement would tend to mitigate the mention of the deferred compensation in the financial reports.

Sindelar claims that the introduction of the terms would be confusing because the agreement was never entered into. Sindelar also claims that the introduction of evidence that Sindelar started working for a competitor, which would have been in violation of the terms of the agreement, would serve to prejudice him. Sindelar notes that a counterclaim by the companies, alleging that Sindelar had breached an employee's duty of loyalty, good faith, and fair dealing, had been dismissed on summary judgment. Sindelar claims that the summary judgment precluded the introduction of evidence of his later employment.

The trial court stated that evidence about Sindelar's postemployment activities was irrelevant. The trial court also held that the terms of the unsigned agreement were irrelevant. The court was not abusing its discretion in so holding. Neither party claimed that the agreement was entered into. Neither party claimed that the alleged oral agreement was based on the unsigned agreement. The terms of the unsigned document were irrelevant to the case. The companies' assignment of error is

without merit.

The companies' remaining assignments of error pertain to the instructions given by the trial court. The companies claim that the trial court erred in giving certain instructions and in refusing to give other instructions. To establish reversible error from a court's refusal to give a requested instruction, an appellant is under a threefold burden to show that the court's refusal was prejudicial, that the tendered instruction is a correct statement of law, and that the instruction is applicable to the evidence in the case. *McClymont v. Morgan*, 238 Neb. 390, 470 N.W.2d 768 (1991). The appellant is required to include in the transcript "any tendered instruction refused, if the appellant intends to assign error to such refusal." Neb. Ct. R. of Prac. 4A(2) (rev. 1988). The instructions which the companies claim to have tendered appear nowhere in the transcript or the bill of exceptions, but only in the brief. A brief may not be used to expand the record. *Scott v. Hall*, 241 Neb. 420, 488 N.W.2d 549 (1992); *Obermeier v. Bennett*, 230 Neb. 184, 430 N.W.2d 524 (1988). Therefore, we will consider only whether the instructions given were wrong.

All the jury instructions must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating a reversal. *Behm v. Northwestern Bell Tel. Co., supra.* In an appeal based on the claim of an erroneous instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant. *Pugh v. Great Plains Ins. Co.*, 239 Neb. 171, 474 N.W.2d 677 (1991).

The companies claim that Sindelar's testimony failed to set forth the required elements of a contract. The companies also claim that the instructions failed to impress upon the jury the rule that the terms of a contract must be definite. The trial court offered two instructions, Nos. 6 and 7, which addressed the measure of specificity necessary for the creation of a contract. Instruction No. 6 stated, in part:

> Before the plaintiff can recover against defendants, the plaintiff must prove, by the greater weight of the evidence,

each and all of the following:

1. That the plaintiff and defendants entered into the contract;

2. The terms of the contract;

3. That the defendants breached the contract as claimed by the plaintiff;

4. That this breach of contract was the proximate cause of some damage to the plaintiff; and

5. The nature and extent of that damage.

Instruction No. 7 stated:

> For there to be a contract, the parties must agree to do or not to do something, which requires an offer and acceptance.
>
> An "offer" is an expression of willingness to enter into an agreement with another, made in such a way that the other party is justified in believing that his acceptance is invited and will result in a contract.
>
> "Acceptance" of an offer is an expression of agreement to the terms of the offer, made while the offer is still open.
>
> The agreement may be written, oral, inferred from conduct, or found in some combination of those ways.

These instructions give sufficient detail concerning the law of contracts. They correctly outline the elements of an offer and of a contract and apply to the evidence in the case. The companies were not prejudiced, nor was a substantial right adversely affected by the instructions. The companies' assignment of error on this point must fail.

The other instruction which the companies assign as error pertains to the measure of damages allowed in the case. The trial court gave the following as instruction No. 11:

> If you find in favor of the plaintiff on his claim of breach of contract, then you must determine the amount of plaintiff's damages.
>
> In this case, the proper measure of damages is the total cash value, including dividends, of the life insurance policy without regard to policy loans at the time plaintiff's employment terminated with the defendants.

The companies claim that the instruction essentially directed a verdict on the issue of damages and failed to allow the jury to

make a credibility determination regarding conflicting testimony given by Abler and Sindelar. Abler stated that he had told Sindelar that the loans against the policy would come out of the companies' share of the death benefits. Sindelar claimed that Abler had told him that the loans would be paid back to the policy.

The companies claim that the conflicting testimony created a question of fact regarding the measure of damages. The inconsistency in the testimony, however, raises a question regarding the existence of a contract, not the measure of damages. Abler's testimony cannot be construed as a statement that the cash value payment would somehow be impaired by the loans. The only testimony regarding the terms of the contract as related to the cash value payment was given by Sindelar. Sindelar claimed that the agreement guaranteed him the full value of the policy upon leaving the company. The paragraph contained in each of the financial reports described the same arrangement. The instruction correctly stated the law, that if the jury found that a contract existed, the full value of the policy was the correct measure of damages.

Finally, we must address Sindelar's cross-appeal. He claims that the Nebraska Wage Payment and Collection Act, Neb. Rev. Stat. §§ 48-1228 through 48-1232 (Reissue 1988, Cum. Supp. 1990, & Cum. Supp. 1992), governs this action. The determination of the applicability of a statute is a question of law, and when considering a question of law, the appellate court makes a determination independent of the trial court. *Berumen v. Casady*, 245 Neb. 936, 515 N.W.2d 816 (1994); *Speidell Monuments v. Wyuka Cemetery*, 242 Neb. 134, 493 N.W.2d 336 (1992).

A question exists whether the payment falls under the statutory definition of "wages." The Nebraska Wage Payment and Collection Act defines wages as "compensation for labor or services rendered by an employee, including fringe benefits, when previously agreed to and conditions stipulated have been met by the employee, whether the amount is determined on a time, task, fee, commission, or other basis." § 48-1229(3) (Cum. Supp. 1990).

Deferred compensation is presently earned but is to be paid

to an employee in the future if he possesses the qualifications required by the plan and he complies with the conditions prescribed by it. See *Wilson v. Marsh*, 162 Neb. 237, 75 N.W.2d 723 (1956). We think the record shows that the cash value of the insurance policy was deferred compensation to be paid to Sindelar by the companies upon the termination of his employment with them. It amounted to a fringe benefit, as it was in the form of a pension.

The insurance policy's cash value was, in effect, wages not payable until Sindelar's employment was terminated. Thus, Sindelar is entitled to an attorney fee of not less than 25 percent of the unpaid wages for his suit in the district court and not less than 25 percent of the unpaid wages for his case in this court, as provided in § 48-1231 (Cum. Supp. 1992). The judgment is modified to award an additional $27,936.25 to Sindelar for attorney fees in the trial court and an additional $27,936.25 for attorney fees in this court.

As so modified, the judgment is affirmed.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. ROCHE, INC., DOING BUSINESS AS THE COPY CENTER, A NEBRASKA CORPORATION, APPELLANT.

520 N.W.2d 539

Filed August 5, 1994. No. S-92-1039.

1. **Appeal and Error.** Regarding questions of law, an appellate court is obliged to reach a conclusion independent of determinations reached by the trial court.
2. **Theft: Value of Goods.** The degree of the crime for grading purposes of Neb. Rev. Stat. § 28-518 (Reissue 1989) must be measured by the value of the property obtained by the defendant as a result of the deception, and the value of any property received by the victim is immaterial.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, and HANNON and MILLER-LERMAN, Judges, on appeal thereto from the District Court for Lancaster County, PAUL D. MERRITT, JR., Judge. Judgment of Court of Appeals reversed.

Patrick T. O'Brien, of Bauer, Galter, O'Brien, Allan & Butler, for appellant.

Don Stenberg, Attorney General, and Marilyn B. Hutchinson for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ.

LANPHIER, J.

Roche, Inc., doing business as The Copy Center, was charged with two counts of theft by deception under Neb. Rev. Stat. § 28-512 (Reissue 1989) for selling two copiers with the meters rolled back, thereby deceiving the buyers with regard to the value of the machines. Following a bench trial in the district court for Lancaster County, the trial court found Roche guilty on both counts. The Nebraska Court of Appeals, in the majority opinion, at *State v. Roche, Inc.*, 2 Neb. App. 445, 511 N.W.2d 195 (1994), affirmed the judgment but sent the case back for resentencing. The Court of Appeals opined that our decisions in *State v. Garza*, 241 Neb. 256, 487 N.W.2d 551 (1992), and *State v. Culver*, 233 Neb. 228, 444 N.W.2d 662 (1989), provide that value is an element of the grade of the offense. The majority opinion stated that the incremental value or the increase in the value due to setting back the meters should be used as the basis for sentencing. The dissent stated that in a theft of property conviction under § 28-512, theft by deception is graded under Neb. Rev. Stat. § 28-518 (Reissue 1989) based upon "the value of the thing involved," and thus, it is the total amount of the transferred cash which should be looked to. We granted the State's petition for further review on the issue of whether, under a theft by deception conviction, the incremental value caused by the deception or the total value of the property transferred shall be used as the basis for sentencing. We reverse the judgment of the Court of Appeals.

SCOPE OF REVIEW

Regarding questions of law, an appellate court is obliged to reach a conclusion independent of determinations reached by the trial court. *Boyles v. Hausmann, ante* p. 181, 517 N.W.2d

610 (1994); *Goeke v. National Farms, Inc.*, 245 Neb. 262, 512 N.W.2d 626 (1994).

ANALYSIS

Section 28-512 provides, "A person commits theft if he obtains property of another by deception." The property obtained by defendant Roche, found guilty of theft by deception, was money.

Grading of theft offenses occurs under § 28-518. Dependent upon the amount of money obtained by deception, the statute, in relevant part, provided:

> (1) Theft constitutes a Class III felony when the value of the thing involved is over one thousand dollars.
>
> (2) Theft constitutes a Class IV felony when the value of the thing involved is three hundred dollars or more, but not over one thousand dollars.
>
> (3) Theft constitutes a Class I misdemeanor when the value of the thing involved is more than one hundred dollars, but less than three hundred dollars.
>
> (4) Theft constitutes a Class II misdemeanor when the value of the thing involved is one hundred dollars or less.

The theft, therefore, is graded by the "value of the thing involved." In theft by deception cases, the property obtained by the defendant and the "thing involved" are the same. The value of the property obtained or the thing involved is therefore the amount of money received by the defendant through its deceptions.

The Court of Appeals erroneously determined that the value of the thing involved was determined by subtracting by the actual value of the copier received by each buyer from the total amount of money the seller received through its deception. Under that analysis, the grading would be determined by measuring the increase in value due to the deceptions—in this case, the increased value due to the turning back of the meters to give the impression of less use and wear and tear.

Other jurisdictions have considered this question of determining the value of property obtained by deception for the grading of offenses when the victim received property of value in exchange for that obtained by deception. In *State v. Forshee*,

588 P.2d 181 (Utah 1978), the defendant set back the odometer on the motor vehicle he sold to the victims. One of the victims testified he would not have purchased the vehicle if he had known its true mileage. The defendant argued that the fair market value of the vehicle should have been subtracted from the price paid by the victims for purposes of grading the crime and that, therefore, he was guilty of only a misdemeanor. The statute made it a crime to obtain or exercise control over the property of another by deception. The court held that the degree of the crime must be measured by the value of the property obtained by the defendant as a result of the deception and that the value of any property received by the victim is immaterial.

In *People v. Ross*, 25 Cal. App. 3d 190, 100 Cal. Rptr. 703 (1972), the defendant was charged with grand theft in selling a number of automobiles with the odometers rolled back. The court analyzed the degree of the theft as follows:

> [T]he defendant erroneously argues that the test is ultimate loss rather than the amount of the money received by the accused. In *People v. Hess* [citation omitted], a case in which two persons agreed to pay $1,000 for a horse falsely represented to them to be pedigreed, and actually paid $550, the court stated . . . : "If the representation was knowingly made, the theft was of $550 and constituted grand theft. . . . Under no circumstance were appellants entitled to offset the actual value of the spurious animal used to accomplish the fraud against the sum obtained from the victims to reduce the crime to petty theft."

25 Cal. App. 3d at 195, 100 Cal. Rptr. at 706.

In *State v. Martinez*, 95 N.M. 795, 626 P.2d 1292 (N.M. App. 1979), the defendant was convicted of fraud in the sale of real property. The court relied on *State v. Forshee, supra*, and *People v. Ross, supra*, to hold that the value of the money received by the defendant through her fraud was determinative of the degree of the crime charged and was not offset by the buyers' having received good title to some of the property purchased.

In *State v. Aurgemma*, 116 R.I. 425, 358 A.2d 46 (1976), the

defendant was convicted of obtaining money by false pretenses. The defendant contended that a conviction for false pretenses hinged on the actual loss suffered by the victim, rather than on the amount of money paid or the worth of the property transferred. The court, citing *LaMoyne v. The State*, 53 Tex. Crim. 221, 111 S.W. 950 (1908), held that the amount of money is pivotal and that the extent of the victim's loss is immaterial on the issue of the degree of the offense charged. We agree with this line of cases.

CONCLUSION

In the present case, Roche obtained property through deception. That property was the amount of money obtained for the copiers, and the value of those sums is easily ascertainable. With respect to count I, the value for grading purposes is the $1,595 obtained by Roche through its deceptions. Under § 28-518(1), the grade is a Class III felony because the theft is over $1,000, and the trial court's judgment in that regard must be affirmed. As to count II, evidence was presented that that victim would not have bought the copier if the deception had not been practiced. The value of the thing involved is the entire sum, $4,220. Under § 28-518(1), the grade is a Class III felony because the theft is over $1,000. However, as Roche was charged with only a Class I misdemeanor, that conviction and sentence of the trial court must also be affirmed.

REVERSED.

JOHN SCHENDT, INDIVIDUALLY AND AS NATURAL GUARDIAN OF JASON SCHENDT AND KELLI SCHENDT, MINORS, APPELLANT, V. JOHN L. DEWEY, M.D., APPELLEE. CINDY SCHENDT, APPELLANT, V. JOHN L. DEWEY, M.D., APPELLEE.

520 N.W.2d 541

Filed August 19, 1994. Nos. S-92-1007, S-92-1008.

1. **Demurrer: Pleadings.** When considering a demurrer to a petition, a court must assume the pleaded facts, as opposed to legal conclusions, are true as alleged and must give the petition the benefit of any reasonable inference arising from the facts alleged; however, a court cannot assume the existence of a fact not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial.
2. **Limitations of Actions.** As a general rule, the limitation period in effect at the time an action is filed governs the action.
3. **Limitations of Actions: Legislature.** The Legislature's power to change limitation periods is subject to two restrictions. First, the Legislature may not deprive a defendant of a bar which has already become complete. Second, the Legislature may not deprive a plaintiff of an already accrued cause of action without providing the plaintiff a reasonable time in which to file the action.
4. **Actions: Limitations of Actions.** A statutory bar and an accrued cause of action are vested rights.
5. **Limitations of Actions.** A person has no vested right in a statute of limitations in effect when her or his cause of action accrues.
6. **Constitutional Law.** A person has no vested right in any common-law rule.
7. **Limitations of Actions.** If a cause of action has accrued before the effective date of a newly enacted or amended statutory limitation period, and if the statute does not allow the plaintiff a reasonable time in which to file the action, then a court will allow the plaintiff a reasonable time after the effective date of the statute in which to file the action.
8. _____. The outer limits of a reasonable time for bringing a suit is the longest repose period set forth in the statute.
9. **Malpractice: Limitations of Actions.** Professional misconduct or any unreasonable lack of skill or fidelity in the performance of professional or fiduciary duties is malpractice and comes within the professional or malpractice statute of limitations.
10. **Actions: Physician and Patient: Malpractice: Fraud.** Fraudulent representations by a physician as to previous negligence or as to the plaintiff's condition do not convert the cause of action from one of malpractice to one of deceit.
11. _____: _____: _____: _____. Misrepresentations by a physician as to treatment needed or accomplished or as to dangers of treatment or changes in the state of the art as to such medical treatment, whether negligently, deliberately, or fraudulently made, come within the legal purview of

malpractice.

12. **Demurrer: Pleadings.** When a court sustains a demurrer, the losing party is entitled to amend the pleadings unless there exists no reasonable possibility that amendment will remedy the deficiency.
13. **Estoppel: Limitations of Actions.** The doctrine of equitable estoppel may be applied to prevent a fraudulent or inequitable result of the statute of limitations.
14. _____: _____. Equitable estoppel may be applied to bar a defendant's use of a statute of repose.
15. **Fraud: Limitations of Actions.** One who by deception conceals material facts and thereby prevents discovery of the wrong should not be permitted to take advantage of his or her own deceit or concealment by asserting the statute of limitations or repose.
16. **Minors: Actions.** A minor child has no common-law cause of action for the loss of the consortium of a nonfatally injured parent.

Appeal from the District Court for Douglas County: JOHN E. CLARK and LAWRENCE J. CORRIGAN, Judges. Affirmed in part, and in part reversed and remanded with directions.

Richard J. Dinsmore for appellants.

John R. Douglas, of Cassem, Tierney, Adams, Gotch & Douglas, and Michael J. Mooney, of Gross & Welch, for appellee.

HASTINGS, C.J., WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ., and SIEVERS, Chief Judge.

PER CURIAM.

Cindy Schendt filed a personal injury action against Dr. John L. Dewey, alleging negligence and fraudulent concealment. Dewey demurred, alleging that the claim was barred by the statute of limitations. The district court sustained the demurrer and dismissed the action. Schendt appeals. Under our authority to regulate the caseloads of the appellate courts of this state, we removed the matter to this court.

When considering a demurrer to a petition, a court must assume the pleaded facts, as opposed to legal conclusions, are true as alleged and must give the petition the benefit of any reasonable inference arising from the facts alleged; however, a court cannot assume the existence of a fact not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial. *Hoiengs v. County of Adams*, 245 Neb. 877, 516 N.W.2d 223 (1994).

Dewey is a medical doctor who, at all relevant times, held himself out as an allergy specialist. He treated Schendt from September 1961 until November 1971. During the course of the treatment, he recommended and conducted various radiation treatments on Schendt.

Following an August 30, 1991, biopsy, Schendt was diagnosed with breast cancer, and in September, her left breast was removed. In April 1992, her right breast was removed.

Schendt filed suit against Dewey on August 19, 1992. Her first cause of action alleges that Dewey was negligent in (1) administering the radiation treatments; (2) failing to warn Schendt of the risks of the treatment; and (3) failing to notify Schendt, after the termination of the physician-patient relationship, of information establishing a link between radiation and the development of cancer. She alleged that Dewey's negligence was the direct and proximate cause of her breast cancer, her medical expenses, her loss of past and future income, and her loss of opportunity for early detection and treatment of cancer.

In what she labels as a second cause of action, Schendt alleges that during the treatment, Dewey fraudulently concealed the risks of the radiation treatment. She further alleges that Dewey's fraudulent concealment was the direct and proximate cause of the damages outlined above.

Schendt's husband, individually and as guardian of the couple's minor children, also filed suit against Dewey and alleged facts identical to those presented in Schendt's petition. However, he alleges that he and the children suffered damages, including loss of expected care, comfort, companionship, and consortium of a spouse and mother. Schendt's husband's case is derivative of her case. The two cases have been consolidated for appeal, including the briefs and oral arguments.

Dewey's demurrer to each of the petitions alleged that the corresponding petition failed to state a cause of action because the petition was barred by Neb. Rev. Stat. § 25-222 (Reissue 1989) and the action was not brought within 10 years of the alleged negligence.

Schendt asserts that the district court erred in sustaining the demurrers. It is contended that (1) § 25-222 does not apply

retroactively to the causes of action, (2) § 25-222 is unconstitutional, (3) Dewey is equitably estopped from raising § 25-222, and (4) a cause of action for fraud is not barred by any statute of limitations.

Schendt has alleged that Dewey negligently failed to inform her, after termination of the physician-patient relationship, of information establishing a link between radiation and the development of cancer. This allegation presumes that a physician has a continuing duty to warn patients of the effect of a particular treatment even when the patient is no longer under the physician's care. We have refused to recognize such a duty. See, *Smith v. Dewey*, 214 Neb. 605, 335 N.W.2d 530 (1983); *Colton v. Dewey*, 212 Neb. 126, 321 N.W.2d 913 (1982). Therefore, the trial court properly sustained Dewey's demurrer to this theory.

At the time Schendt filed her action for professional negligence, such actions were subject to the limitation periods described in § 25-222. The statute provides:

> Any action to recover damages based on alleged professional negligence or upon alleged breach of warranty in rendering or failure to render professional services shall be commenced within two years next after the alleged act or omission in rendering or failure to render professional services providing the basis for such action; *Provided*, if the cause of action is not discovered and could not be reasonably discovered within such two-year period, then the action may be commenced within one year from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier; *and provided further*, that in no event may any action be commenced to recover damages for professional negligence or breach of warranty in rendering or failure to render professional service more than ten years after the date of rendering or failure to render such professional service which provides the basis for the cause of action.

The present dispute concerns the 10-year period limiting discovery. The parties have referred to this as a statute of repose, and in previous cases, we have done likewise. See,

Smith, supra; *Colton, supra*.

Schendt contends that § 25-222 does not apply to her action. As a general rule, the limitation period in effect at the time an action is filed governs the action. See *Givens v. Anchor Packing*, 237 Neb. 565, 466 N.W.2d 771 (1991). Under the general rule, § 25-222 would govern Schendt's action. The general rule, however, does not express the full extent of the law.

The Legislature's power to change limitation periods is subject to two restrictions. See, generally, *Givens, supra*. First, the Legislature may not deprive a defendant of a bar which has already become complete. *Id.* Second, the Legislature may not deprive a plaintiff of an already accrued cause of action without providing the plaintiff a reasonable time in which to file the action. *Macku v. Drackett Products Co.*, 216 Neb. 176, 343 N.W.2d 58 (1984).

The rationale for these two restrictions is grounded in the due process clause of Neb. Const. art. I, § 3, which prevents deprivations of property without due process of law. *Givens, supra*. A statutory bar and an accrued cause of action are vested rights. See, *Karl v. Bryant Air Conditioning*, 416 Mich. 558, 331 N.W.2d 456 (1982) (accrued cause of action); *Givens, supra* (statutory bar); *Denver Wood Products Co. v. Frye*, 202 Neb. 286, 275 N.W.2d 67 (1979) (statutory bar); *Saft v. Upper Dublin Tp.*, 161 Pa. Commw. 158, 636 A.2d 284 (1993) (accrued cause of action). Like other vested rights, they cannot be impaired by a subsequent legislative act. See *Givens, supra*. Accord, *Colton v. Dewey, supra* (Legislature is free to create and abolish rights, so long as no vested rights are disturbed); *State ex rel. Douglas v. Nebraska Mortgage Finance Fund*, 204 Neb. 445, 283 N.W.2d 12 (1979) (legislative act cannot interfere with vested rights).

At oral argument, Schendt contended that she had a vested right in her accrued cause of action, in the statute of limitations in effect at the time her cause of action accrued, and in the discovery rule in effect at the time her cause of action accrued. Schendt is only partially correct. As we have just noted, an accrued cause of action is a vested right. However, a person has no vested right in a statute of limitations in effect when her or

his cause of action accrues. *Macku, supra*. See, *State v. Hirsch*, 245 Neb. 31, 511 N.W.2d 69 (1994); *Denver Wood Products Co., supra*. In addition, a person has no vested right in any common-law rule. *Munn v. Illinois*, 94 U.S. (4 Otto) 113, 24 L. Ed. 77 (1876); *Peterson v. Cisper*, 231 Neb. 450, 436 N.W.2d 533 (1989); *Prendergast v. Nelson*, 199 Neb. 97, 256 N.W.2d 657 (1977). The discovery rule in effect prior to the enactment of § 25-222 was a common-law rule, announced in *Spath v. Morrow*, 174 Neb. 38, 115 N.W.2d 581 (1962).

We find that Schendt had no vested right in either the statute of limitations or the discovery rule. Schendt's argument regarding an accrued cause of action, however, requires further discussion.

With respect to her vested right in an accrued cause of action, Schendt's argument may be summarized as follows: Schendt alleged negligence occurring between September 1961 and November 1971. She argues that her cause of action accrued in or before November 1971. Section 25-222 became effective in July 1972. Before § 25-222 became effective, Schendt had an unlimited time in which to discover her cause of action. After § 25-222 became effective, Schendt claims, she did not have a reasonable time to discover her cause of action. Therefore, Schendt reasons that § 25-222, and more particularly the 10-year period of § 25-222, does not apply to her action. Schendt concludes that because the 10-year period of § 25-222 does not apply, she has an unlimited time in which to file her action.

We assume, for the sake of argument, that Schendt's cause of action accrued prior to 1972. We also assume that Schendt's argument is correct and that the 10-year period of § 25-222 does not apply because it did not provide Schendt with a reasonable period in which to file her action. Even with these assumptions, we conclude that Schendt's action is untimely.

Schendt reasons that if the 10-year period of § 25-222 does not apply, we should allow her action to go forward because she filed within 1 year of discovery, as required by § 25-222. Schendt's reasoning is not without support. See, *Browning v. Maytag Corporation*, 261 Ga. 20, 401 S.E.2d 725 (1991); *Lott v. Haley*, 370 So. 2d 521 (La. 1979). This position, however,

fails to give any respect to the Legislature, which, by enacting a repose period, has clearly expressed its intent to limit the discovery exception.

Rather than choose the remedy suggested by Schendt, we choose to follow the remedy suggested by courts in Illinois and Vermont. Courts in those states allow an action such as Schendt's to go forward so long as it was filed within the proper time after discovery *and* within a reasonable time after the effective date of the statute. See, *Mega v. Holy Cross Hospital*, 111 Ill. 2d 416, 490 N.E.2d 665 (1986); *Lillicrap v. Martin*, 156 Vt. 165, 591 A.2d 41 (1989). See, also, *Merrigan v. Epstein*, 112 Wash. 2d 709, 773 P.2d 78 (1989) (finding that the time limit for bringing a claim under a new statute begins to run, for preexisting claims, only on the effective date of the statute). This position, while recognizing that the statute as written may not apply, acknowledges the Legislature's intent to limit the discovery exception.

We find that if a cause of action has accrued before the effective date of a newly enacted or amended statutory limitation period, and if the statute does not allow the plaintiff a reasonable time in which to file the action, then a court will allow the plaintiff a reasonable time after the effective date of the statute in which to file the action. The question then becomes, What is a reasonable time in which to file the action after the effective date of the statute? In several cases, we have addressed whether a particular statute of limitations provided a reasonable time in which to file suit. See, e.g., *Macku v. Drackett Products Co.*, 216 Neb. 176, 343 N.W.2d 58 (1984); *Educational Service Unit No. 3 v. Mammel, O., S., H. & S., Inc.*, 192 Neb. 431, 222 N.W.2d 125 (1974). In each case, we concluded that the statute did provide a reasonable time. None of these cases reach the issue of whether a court should allow additional time and, if so, how much time. None of these cases involved a cause of action which was undiscovered on the effective date of the statute.

We find that the outer limits of a reasonable time for bringing a suit is the longest repose period set forth in the statute. Therefore, a reasonable period for bringing the suit is a period not greater than the 10-year repose statute set forth in § 25-222.

See *Mega, supra*. Section 25-222 became effective in July 1972. It provided for a 10-year statute of repose, and in order to bring her action within a reasonable time, Schendt had to bring her action no later than 10 years after the effective date of the statute. Schendt brought her action approximately 20 years after the effective date of the statute, and we conclude, therefore, that Schendt's action was untimely.

Schendt contends that if § 25-222 applies, the statute is unconstitutional because it violates the "open courts" provision of the Nebraska Constitution: "All courts shall be open, and every person, for any injury done him in his lands, goods, person or reputation, shall have a remedy by due course of law, and justice administered without denial or delay." Neb. Const. art. I, § 13. In *Colton v. Dewey*, 212 Neb. 126, 321 N.W.2d 913 (1982), we held that § 25-222 did not violate the open courts provision. In addressing this issue, we noted that prior to the enactment of § 25-222, a medical malpractice action accrued when the patients discovered, or in the exercise of reasonable diligence should have discovered, the malpractice. In § 25-222, we stated, the Legislature attempted to limit the period of discovery to 10 years. We held that that prevented some patients' malpractice actions from ever arising. In the statute, the Legislature defined substantive rights. We held that defining substantive rights was a valid exercise of legislative power and, therefore, that § 25-222 did not violate the open courts provision. In *Colton*, we recognized that a statute of repose may prevent what would otherwise be a cause of action from ever arising, and we held that such prevention did not violate the open courts provision. We adhere to our decision in *Colton* and hold that § 25-222 does not violate the open courts provision of the Nebraska Constitution.

Our inquiry, however, does not end here. In her petition, Schendt sets forth what she calls a second cause of action, grounded in fraud. The second cause incorporates all of the allegations with regard to negligence. It then alleges that

> during the course of defendant's administration of radiation to the plaintiff and continuing to date, the defendant has fraudulently concealed the risks of the treatment process that he administered to plaintiff and

> therefore prevented her from taking any prophylatic [sic] or preventive treatment or diagnostic undertaking to prevent or lessen the development of cancer or the early detection and treatment of cancer.

Despite what Schendt calls her second cause of action, it remains one of medical malpractice, expressing a different theory upon which to allow recovery. "[P]rofessional misconduct or any unreasonable lack of skill or fidelity in the performance of professional or fiduciary duties is 'malpractice' and comes within the professional or malpractice statute of limitations." *Colton*, 212 Neb. at 131-32, 321 N.W.2d at 917. Fraudulent representations by a physician as to previous negligence or as to the plaintiff's condition do not convert the cause of action from one of malpractice to one of deceit. *MacMillen v. A. H. Robins Co.*, 217 Neb. 338, 348 N.W.2d 869 (1984). Misrepresentations by a physician as to treatment needed or accomplished or as to dangers of treatment or changes in the state of the art as to such medical treatment, whether negligently, deliberately, or fraudulently made, come within the legal purview of malpractice. Schendt did not, and could not, amend her petition to change a malpractice action into a fraud action, and the trial court was correct in sustaining the demurrer and in dismissing her petition.

However, when a court sustains a demurrer, the losing party is entitled to amend the pleadings unless there exists no reasonable possibility that amendment will remedy the deficiency. *DeVaux v. DeVaux*, 245 Neb. 611, 514 N.W.2d 640 (1994). See, also, Neb. Rev. Stat. § 25-854 (Reissue 1989). Instead of allowing the amendment, the district court dismissed Schendt's action.

Section 25-854 provides: "If the demurrer be sustained, the adverse party may amend, if the defect can be remedied by way of amendment, with or without costs, as the court in its discretion shall direct."

We now deal with the issue as to whether a claim of fraudulent concealment of facts may furnish the basis for equitable estoppel to prevent or delay the running of the statute of repose as to a cause of action for malpractice. The doctrine of equitable estoppel may be applied to prevent a fraudulent or

inequitable result of the statute of limitations. *Reifschneider v. Nebraska Methodist Hosp.*, 233 Neb. 695, 447 N.W.2d 622 (1989). Equitable estoppel may be applied to bar a defendant's use of a statute of repose. See *MacMillen v. A. H. Robins Co., Inc., supra.*

One who by deception conceals material facts and thereby prevents discovery of the wrong should not be permitted to take advantage of his or her own deceit or concealment by asserting the statute of limitations or repose. *Muller v. Thaut*, 230 Neb. 244, 430 N.W.2d 884 (1988). In the event that Schendt can amend her petition to establish that Dewey fraudulently concealed a material fact, that this fraudulent concealment prevented her from bringing the action within the confines of § 25-222, and that she brought her action within a reasonable time after discovery of the fraudulent concealment, then it is possible to state a cause of action for malpractice in which Dewey might be equitably estopped from raising the statute of repose. She should have been given that opportunity.

However, no amendment is permitted as to that portion of Schendt's husband's petition alleging a cause of action in favor of the minor children. A minor child has no common-law cause of action for the loss of the consortium of a nonfatally injured parent. *Guenther v. Stollberg*, 242 Neb. 415, 495 N.W.2d 286 (1993). See *Vosburg v. Cenex-Land O'Lakes Agronomy Co.*, 245 Neb. 485, 513 N.W.2d 870 (1994).

Except for the judgment dismissing the action for the benefit of the minor children, which is affirmed, we reverse the judgments against John Schendt individually and Cindy Schendt and remand the cause with directions to allow the Schendts 14 days in which to amend their petitions if such is their desire.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

FAHRNBRUCH, J., dissenting.

The majority's holding in this case defeats the purpose of this state's statute of repose. According to the majority, there is no time limit as to when a patient must "discover" the alleged "malpractice" of a physician if the patient alleges facts sufficient to state a cause of action for fraudulent concealment

against the physician. Under the majority rule, if a patient's breast cancer is "discovered" 50 years following a physician's alleged malpractice, the patient's cause of action could withstand not only Nebraska's statute of limitations but also this state's statute of repose, the very purpose of both of which is to prevent stale claims and which, in my opinion, should apply to all causes of action. I respectfully dissent.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. TIMOTHY S. EGAN, RESPONDENT.
520 N.W.2d 779

Filed September 2, 1994. No. S-90-1204.

Original action. Judgment of disbarment.

HASTINGS, C.J., BOSLAUGH, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ.

PER CURIAM.

Timothy S. Egan was admitted to the practice of law in Nebraska in 1979. On October 16, 1990, Egan was charged in the U.S. District Court for the District of Nebraska with the felony offenses of conspiracy to distribute and possession with the intent to distribute methamphetamines, in violation of 21 U.S.C. §§ 846 and 841(a)(1) (1988). On December 14, Egan was temporarily suspended from the practice of law in Nebraska by order of this court.

On May 15, 1992, Egan was convicted in the U.S. District Court for the District of Nebraska of the above-mentioned felony offenses. Egan was sentenced to a term of incarceration of 15 years 8 months. The U.S. Court of Appeals for the Eighth Circuit subsequently upheld Egan's convictions, reported in *U.S. v. Lucht*, 18 F.3d 541 (8th Cir. 1994).

On August 10, 1994, Egan voluntarily surrendered his license. Egan admitted that he was convicted as set forth previously and that such convictions violate Canon 1, DR

1-102(A)(1), (3), and (6), of the Code of Professional Responsibility as adopted by this court. Egan admitted his convictions violate his oath of office as an attorney.

Egan waived his right to notice, appearance, or hearing prior to the entry of this order. We accept Egan's surrender, and order him disbarred from the practice of law in the State of Nebraska, effective immediately.

JUDGMENT OF DISBARMENT.

WHITE, J., not participating.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. MAURICE DAVID STEIER, RESPONDENT.

520 N.W.2d 779

Filed September 2, 1994. No. S-94-714.

Original action. Judgment of disbarment.

HASTINGS, C.J., BOSLAUGH, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ.

PER CURIAM.

Respondent, Maurice David Steier, has filed with this court a voluntary surrender of his license to practice law in the State of Nebraska. He admits his conviction in the U.S. District Court for the District of Columbia of the felony offense of giving an illegal gratuity to a public official, in violation of 18 U.S.C. § 201(c)(1)(A) (1988), which conviction has been affirmed by the U.S. Court of Appeals for the District of Columbia Circuit.

The conviction evidences conduct that constitutes a violation of Canon 1, DR 1-102(A)(1), (3), and (6), of the Code of Professional Responsibility and a violation of his oath as an attorney.

The surrender of license is accepted, and the respondent is ordered disbarred, effective immediately.

JUDGMENT OF DISBARMENT.

WHITE, J., not participating.

JOSEPHINE UPAH, APPELLEE, V. ANCONA BROS. CO. ET AL., APPELLANTS.

521 N.W.2d 895

Filed September 23, 1994. No. S-91-699.

1. **Corporations: Conspiracy: Pleadings: Proof.** In order to prevail on a claim of civil conspiracy against a company, the plaintiff is required to plead and prove that the individual defendants acted outside the scope of their authority or other than in the normal course of their corporate duties in furtherance of the conspiracy.
2. **Limitations of Actions: Pleadings.** If a petition alleges a cause of action ostensibly barred by the statute of limitations, such petition, in order to state a cause of action, must show some excuse tolling the operation and bar of the statute.
3. **Limitations of Actions: Pleadings: Appeal and Error.** A petition which shows on its face that the action is barred by the statute of limitations may be attacked on appeal. However, on appeal, the petition will be liberally construed to determine whether it states a cause of action.
4. **Conspiracy: Liability.** A claim of civil conspiracy is not actionable in itself, but serves to impose vicarious liability for the underlying wrongs of those who are party to the conspiracy.
5. **Conspiracy: Limitations of Actions.** The statute of limitations applicable to civil conspiracy is that applicable to the underlying wrong.
6. **Limitations of Actions.** The point at which a statute of limitations commences to run must be determined from the facts of each case. A cause of action accrues and the statute of limitations begins to run when the aggrieved party has the right to institute and maintain a suit. Generally, this is true even though the plaintiff may be ignorant of the existence of the cause of action.
7. **Fraud: Limitations of Actions: Proof.** Under the doctrine of fraudulent concealment, the plaintiff must show that he or she exercised due diligence to discover his or her cause of action before the statute of limitations expired and that the defendant committed some affirmative act of fraudulent concealment which prevented the plaintiff from discovering his or her cause of action. Unless there is a fiduciary relationship between the parties, mere silence is not enough to overcome the applicable period of limitation.
8. **Appeal and Error.** When reviewing a question of law, an appellate court is obligated to reach a conclusion independent of the trial court's ruling.
9. **Equity: Appeal and Error.** In an appeal of an equitable action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, an appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
10. **Trusts: Notice.** A trustee who disposes of part of the trust property without the knowledge of or notice to a beneficiary has a duty to notify the beneficiary as to the transaction.

Appeal from the District Court for Douglas County: KEITH HOWARD, Judge. Appeal dismissed in part, and in part reversed and remanded for further proceedings.

Jerrold L. Strasheim, Gerald P. Laughlin, and Mary L. Swick, of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, for appellant Ancona Bros. Co.

Fredric H. Kauffman, Shawn D. Renner, and Gregory S. Heier, of Cline, Williams, Wright, Johnson & Oldfather, for appellants Samuel A. Ancona, Joseph I. Ancona, and Carl Ancona.

William Jay Riley, Lisa M. Henkel, and Gerald L. Friedrichsen, of Fitzgerald, Schorr, Barmettler & Brennan, P.C., for appellee.

BOSLAUGH, FAHRNBRUCH, and LANPHIER, JJ., and SIEVERS, Chief Judge, and CONNOLLY, HANNON, and IRWIN, Judges.

BOSLAUGH, J.

The plaintiff, Josephine (Ancona) Upah, filed this action in the Douglas County District Court for civil conspiracy against the defendants, Samuel A. Ancona, Joseph I. Ancona, Carl Ancona, and Ancona Bros. Co. (Company), on March 1, 1989. The individual defendants are the plaintiff's brothers, who are shareholders, officers, and directors of the Company. The case was tried to a jury upon the third amended petition. The jury returned a verdict for the plaintiff in the amount of $3,766,000.

The plaintiff and the individual defendants are the children of Ignatius and Dorothy Ancona and the niece and nephews of Charles Ancona and Vita Ancona, Ignatius' bachelor brother and sister. Ignatius and Charles founded the Company, which is primarily a wholesale food-service distributor, in 1915.

In support of her claim of the defendants' conspiracy to deprive her of stock ownership in the Company, the plaintiff's petition specifically alleges in paragraph 12 various acts of conversion, denial of preemptive rights, and excessive compensation of the individual defendants. It is important to note that other than the use of the words "fraud" and "defraud" the plaintiff does not make any specific allegations

of fraud.

The following are allegations made in paragraph 12 of the second amended petition:

> a. Plaintiff became the owner of ten shares of Ancona Bros. Co. stock as evidenced by Ancona Bros. Co. stock certificate number 48 dated June 21, 1961 . . . . Plaintiff never conveyed away such stock to any transferee yet the individual defendants as directors and managing officers of the company, without the knowledge or consent of plaintiff, caused the stock ledger records for Ancona Bros. Co. to reflect that the plaintiff was no longer the owner of said shares of stock after 1964, and they have deprived plaintiff of all benefits of a shareholder in the company. The individual defendants had custody of, control over and responsibility for the stock ledger records. The plaintiff has insufficient information to know which individual defendants physically made the stock ledger entries or directed the making of the entries.
>
> b. On or about June 23, 1965, Samuel A. Ancona, Joseph I. Ancona and Carl Ancona, without notice to or the knowledge of the female shareholders, caused Ancona Bros. Co. to issue for each of themselves forty additional shares of stock. Defendants deprived plaintiff and other female shareholders, Dorothy and Vita Ancona, of their preemptive rights to acquire a proportionate amount of additional stock in their own name.
>
> c. Ignatius S. Ancona died on November 6, 1965, owning 433-1/2 shares of stock in Ancona Bros. Co. Plaintiff became the owner of 72-1/4 shares of such stock pursuant to the decree on final account nunc pro tunc entered in such proceeding which divided the property of the estate in undivided proportions as follows: Dorothy G. Ancona, one-third; Samuel A. Ancona, one-sixth; Joseph I. Ancona, one-sixth; Carl Ancona, one-sixth; Josephine Ancona Upah, one-sixth. After the estate was closed and the Executors discharged, Samuel A. Ancona, Joseph I. Ancona and Carl Ancona as directors and managing officers of Ancona Bros. Co. with custody of, control over and responsibility for the corporate stock

records failed to register plaintiff's shares in the corporate stock book and failed to issue her certificate of stock thereby depriving plaintiff of her benefits of ownership in the 72-1/4 shares.

d. Likewise, after the Ignatius S. Ancona estate was closed and the Executors discharged, Samuel A. Ancona, Joseph I. Ancona and Carl Ancona as directors and managing officers of Ancona Bros. Co. with custody of, control over and responsibility for the corporate stock records failed to register Dorothy G. Ancona's shares in the corporation's stock book and failed to issue her certificate of stock for her 144-1/2 shares of Ancona Bros. Co. stock. These 144-1/2 shares which should have been issued to Dorothy G. Ancona would later have redounded to the benefit of the plaintiff as set forth in Paragraph 12(j) below.

e. On or about June 6, 1966, Samuel A. Ancona, Joseph I. Ancona and Carl Ancona, without notice to or the knowledge of the female shareholders, caused Ancona Bros. Co. to issue for each of themselves forty additional shares of stock. Defendants deprived plaintiff and other female shareholders, Dorothy and Vita Ancona, and the Ignatius S. Ancona Estate of their preemptive rights to acquire a proportionate amount of additional stock in their own name.

f. On or about May 14, 1968, Samuel A. Ancona, Joseph I. Ancona and Carl Ancona, without notice to or the knowledge of the female shareholders, caused Ancona Bros. Co. to issue for each of themselves fifty additional shares of stock. Defendants deprived plaintiff and other female shareholders, Dorothy and Vita Ancona, of their preemptive rights to purchase a proportionate amount of stock in their own name.

g. On or about October 21, 1969, Samuel A. Ancona, Joseph I. Ancona and Carl Ancona, without notice to or the knowledge of the female shareholders, caused Ancona Bros. Co. to issue for each of themselves four hundred additional shares of stock. Defendants deprived plaintiff and other female shareholders, Dorothy and Vita

Ancona, of their preemptive rights to purchase a proportionate amount of stock in their own name.

h. On or about June 1, 1976, Vita Ancona made a gift of 61-3/4 shares of said Ancona Bros. Co. stock to plaintiff. Subsequent thereto, the individual defendants without plaintiff's knowledge or consent cancelled the stock certificate with a date noted of June 11, 1976 and a signature of Sam Ancona and caused the corporate stock ledger to reflect transfer of this stock certificate from Josephine Ancona Upah to treasury stock. To the best of plaintiff's knowledge no value was transferred to plaintiff. The stock value referenced in the corporate records for the 61 3/4 shares of stock, a par value of $100 per share or $6,175, was less than the fair market value of the stock.

i. Charles S. Ancona died on March 8, 1974, owning 489-1/2 shares of Ancona Bros. Co. stock. Vita Ancona, sister of Charles S. Ancona, was the beneficiary of one-half of the residue of the estate and she received 244-3/4 shares of Ancona Bros. Co. stock. The remaining one-half of the Charles S. Ancona estate was to be held in trust for the benefit of Vita Ancona during her lifetime, thereafter the remainder was to be distributed one-fourth outright to each of Carl Ancona, Joseph I. Ancona and Samuel Ancona and one-fourth in trust for the benefit of Josephine Ancona Upah for her lifetime. Vita Ancona revoked her life estate in the trust sometime in the first half of 1979, and on or about June 1979, Samuel A. Ancona and Joseph I. Ancona, Co-Trustees of the Charles S. Ancona testamentary trust, without plaintiff's knowledge or consent caused the stock owned by the trust to be transferred to Ancona Bros. Co. without any consideration. The individual defendants thereafter reissued such shares to themselves, Carl Ancona, Joseph I. Ancona and Samuel A. Ancona. No stock and nothing of value was transferred to plaintiff or to the Charles S. Ancona trust for plaintiff's one-fourth beneficial interest in the trust.

j. Dorothy G. Ancona died on January 24, 1980. The residue of the estate, including 60 shares of Ancona Bros.

Co. stock, was distributable to the Dorothy G. Ancona testamentary trust. The trust was to be managed by the individual defendants as trustees for the benefit of plaintiff during her lifetime and thereafter distributed to the individual defendants. The individual defendants caused the 60 shares of stock to be purchased by Ancona Bros. Co. at $130.71 per share for a total of $7,842. The purchase price was a fraction of the stock's fair market value resulting in a benefit to the defendants as principal shareholders in the corporation and to the detriment of plaintiff. The book value or net asset value shown on the company's March 30, 1980 audit report was $294.79 per share without necessary increases for the company LIFO inventory accounting method, for current valuations of depreciated assets less taxes, for good will, for the stock issued without recognition of preemptive rights (see Paragraph 12b, e, f & g, supra) and for the individual defendant's [sic] distribution of corporate profits solely among themselves over the years rather than retaining earnings for the corporation or paying the profits out to all stockholders including plaintiff as dividends. In the fiscal year ending March 30, 1980, the individual defendants distributed to themselves approximately $480,000 in company profits, over and above their salaries, paying themselves total income of over $220,000 each. The plaintiff has insufficient information now to determine the valuations of depreciated assets, any good will and an appropriate fair market value multiplier; however, adjusting the 1980 audit book value or net asset value for the preemptive rights void stock issuances, for LIFO and for the 1980 distributed corporate profits would make that book value or net asset value over $1,152.00 per share. The fair market value of the stock should then be in excess of $1,152.00 per share, and the value of the 60 shares should be in excess of $69,120.00. The amount of that excess value is presently unknown to the plaintiff.

k. Plaintiff has learned now that she has a personal account at Ancona Bros. Co. These funds apparently consisted in whole or in part of gifts to plaintiff by her

father during his lifetime that defendants have controlled and used for working capital in Ancona Bros. Co. through annual loans of the money to the company without any knowledge or consent by plaintiff. The individual defendants without plaintiff's knowledge or consent caused transfers to be made from plaintiff's personal account into the Dorothy G. Ancona testamentary trust in which defendants are the remainder beneficiaries and deprived plaintiff of some other assets belonging to her by making transfers without plaintiff's knowledge or consent. These transfers include the following:

(1) Transfers on the following dates in the stated amounts from plaintiff's personal account to the Dorothy G. Ancona trust: [the dates are from 12/22/82 through 10/08/87, and the amounts range from $500 to $5,000;]

(2) The individual defendants without plaintiff's knowledge or consent also caused a bonus check issued to plaintiff by Ancona Bros. Co. to be deposited into the Dorothy G. Ancona testamentary trust account in the amount of $2,564.00 on or about July 30, 1980;

(3) The individual defendants caused interest earned upon plaintiff's personal account in the amount of $3,337.71 to be deposited into the Dorothy G. Ancona testamentary trust on April 1, 1985;

(4) The individual defendants caused interest earned upon plaintiff's personal account in the amount of $2,070.86 to be deposited into the Dorothy G. Ancona testamentary trust on April 5, 1986;

(5) The individual defendants without plaintiff's knowledge or consent deposited into the Dorothy G. Ancona testamentary trust $3,980.03 on or about April 24, 1981, which it appears belonged outright to plaintiff;

(6) Additionally, defendants, without plaintiff's knowledge or consent, transferred into the Dorothy G. Ancona testamentary trust on or about March 17, 1981, $10,776.66, which amount apparently represented part of Plaintiff's personal inheritance from the 1965 Ignatius S. Ancona estate; and

(7) Defendants have failed to document or explain the

> legitimacy of other deposits into the Dorothy G. Ancona trust accounts, rather than distributions outright to plaintiff, with regard to the following amounts: $14,436.56 transferred from First National Bank on March 7, 1980; $6,062.51 deposited March 14, 1980; and $1,018.21 deposited April 1, 1980.

The plaintiff alleged that the Company is jointly and severally liable for the acts of the individual defendants. According to the plaintiff's second amended petition: "The actions of the individual defendants were done within the scope of their corporate duties, and those actions and the individual defendants' knowledge are imputed to Ancona Bros. Co."

The plaintiff also alleged that she had no knowledge and no reason to know of the defendants' conspiracy until January 1989, 2 years after she had given her ex-husband, Richard Upah, power of attorney. The plaintiff gave Upah power of attorney after her brother Samuel told her she was running out of money from accounts held by the defendants for her and that she must cut back on the expenses of help for her health care. The plaintiff has multiple sclerosis.

In her prayer for relief in the second amended petition, the plaintiff requested damages and equitable relief.

The Company assigned as error that the plaintiff failed to allege a cause of action against it for civil conspiracy. In order to prevail on a claim of civil conspiracy against the Company, the plaintiff was required to plead and prove that the individual defendants acted outside the scope of their authority or other than in the normal course of their corporate duties in furtherance of the conspiracy. See *Renner v. Wurdeman*, 231 Neb. 8, 434 N.W.2d 536 (1989). The plaintiff failed to plead that the individual defendants were acting outside the scope of their authority in furtherance of the conspiracy. Instead, the plaintiff alleged, "The actions of the individual defendants were done within the scope of their corporate duties, and those actions and the individual defendants' knowledge are imputed to Ancona Bros. Co."

As a matter of law, the plaintiff failed to state a claim for civil conspiracy against the Company, particularly as to those actions of the individual defendants in their capacities as

brothers, personal representatives, and trustees.

In their answers, the defendants pled that the plaintiff's claims were barred by the statute of limitations. A separate trial was held on the statute of limitations issue on June 20, 1990. In an order dated July 9, 1990, the trial court held that the plaintiff's claims were not barred by the statute of limitations.

The individual defendants and the Company contend the trial court erred in its decision concerning the statute of limitations issue because the plaintiff's petition was barred on its face by the statute of limitations, thus failing to state a cause of action.

" 'If a petition alleges a cause of action ostensively barred by the statute of limitations, such petition, in order to state a cause of action, must show some excuse tolling the operation and bar of the statute.' " *L.J. Vontz Constr. Co. v. Department of Roads*, 232 Neb. 241, 243-44, 440 N.W.2d 664, 665 (1989), quoting *Rosnick v. Marks*, 218 Neb. 499, 357 N.W.2d 186 (1984). Accord, *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.*, 244 Neb. 408, 507 N.W.2d 275 (1993); *Broekemeier Ford v. Clatanoff*, 240 Neb. 265, 481 N.W.2d 416 (1992); *DeSciose v. Chiles, Heider & Co.*, 239 Neb. 195, 476 N.W.2d 200 (1991); *League v. Vanice*, 221 Neb. 34, 374 N.W.2d 849 (1985); *S.I.D. No. 145 v. Nye*, 216 Neb. 354, 343 N.W.2d 753 (1984). When it is apparent on its face that an action is barred by the statute of limitations, the petition fails to state a cause of action. *Plock v. Crossroads Joint Venture*, 239 Neb. 211, 475 N.W.2d 105 (1991), citing *L.J. Vontz Constr. Co., supra*.

A petition which shows on its face that the action is barred by the statute of limitations may be attacked on appeal. *Plock, supra*. However, on appeal, the petition will be liberally construed to determine whether it states a cause of action. *Id.*

A claim of civil conspiracy is not actionable in itself, but serves to impose vicarious liability for the underlying wrongs of those who are party to the conspiracy. *Riddell v. Riddell Washington Corp.*, 866 F.2d 1480 (D.C. Cir. 1989). See, *Treptow Co. v. Duncan Aviation, Inc.*, 210 Neb. 72, 313 N.W.2d 224 (1981); *Trebelhorn v. Bartlett*, 154 Neb. 113, 47 N.W.2d 374 (1951). The statute of limitations applicable to civil conspiracy is that applicable to the underlying wrong. See

Riddell, supra.

In this case, the underlying wrongs of the plaintiff's alleged conspiracy are alleged acts of conversion by the defendants (paragraph 12(a), (c), (d), (h), (i), (j), and (k)), alleged denials of the plaintiff's preemptive rights concerning various stock issuances to the defendants (paragraph 12(b), (e), (f), and (g)), and alleged excessive compensation (paragraph 12(j)).

The statute of limitations for conversion actions is 4 years. Neb. Rev. Stat. § 25-207(2) (Reissue 1989). Preemptive rights are provided by Neb. Rev. Stat. § 21-2025 (Reissue 1991). The statute of limitations applicable to an action upon a liability created by statute is 4 years. Neb. Rev. Stat. § 25-206 (Reissue 1989). The statute of limitations for excessive compensation is 4 years. § 25-207(3).

The point at which a statute of limitations commences to run must be determined from the facts of each case. A cause of action accrues and the statute of limitations begins to run when the aggrieved party has the right to institute and maintain a suit. Generally, this is true even though the plaintiff may be ignorant of the existence of the cause of action. *St. Paul Fire & Marine Ins. Co., supra*; *Mangan v. Landen*, 219 Neb. 643, 365 N.W.2d 453 (1985); *Jones v. Johnson v. Pullen*, 207 Neb. 706, 300 N.W.2d 816 (1981); *Grand Island School Dist. #2 v. Celotex Corp.*, 203 Neb. 559, 279 N.W.2d 603 (1979).

The plaintiff did not file this action until March 1, 1989. Most of the claims alleged in the plaintiff's petition involve transactions beginning on June 21, 1961, and completed prior to the end of 1980. With the exception of the claims contained in paragraph 12(k), which were abandoned by the plaintiff prior to the jury trial of this matter, and the allegations in paragraph 12(i), the plaintiff's petition for civil conspiracy was barred on its face by the applicable statute of limitations.

In this case, the only excuse available to the plaintiff to avoid the bar of the statute of limitations is that the defendants fraudulently concealed the cause of action from her. See *Muller v. Thaut*, 230 Neb. 244, 430 N.W.2d 884 (1988). Under the doctrine of fraudulent concealment, the plaintiff must show that he or she exercised due diligence to discover his or her cause of action before the statute of limitations expired and that the

defendant committed some affirmative act of fraudulent concealment which prevented the plaintiff from discovering his or her cause of action. *Kicken v. Valentine Production Credit Ass'n*, 628 F. Supp. 1008 (D. Neb. 1984). Unless there is a fiduciary relationship between the parties, mere silence is not enough to overcome the applicable period of limitation. *Lumber Village v Siegler*, 135 Mich. App. 685, 355 N.W.2d 654 (1984).

In her petition, the plaintiff does not allege facts explaining why the statute of limitations on her cause of action is tolled, but only that she did not know and could not have known about the defendants' alleged conspiracy until January 1989.

Even construing the plaintiff's petition liberally, it fails to allege that the defendants committed some act of fraudulent concealment which prevented the plaintiff from discovering her cause of action.

Furthermore, with the exception of the allegation made in paragraph 12(i), that the individual defendants transferred stock in the Charles Ancona trust to themselves without consideration or notice to the plaintiff, the record of the trial on the statute of limitations fails to show that the defendants concealed any facts which would have put the plaintiff on notice of any cause of action.

At the time of the trial on the statute of limitations, the operative pleading was the plaintiff's second amended petition. The prayer for relief in plaintiff's second amended petition asked for damages for the various acts of conversion alleged in paragraph 12, for damages for alleged excessive compensation paid to the defendants, for damages for the Company's failure to declare dividends to her, and for a declaratory judgment that the stock acquisitions by the defendants which allegedly violated the plaintiff's preemptive rights are void.

On November 21, 1990, the plaintiff sought leave to file a third amended petition, which was substantially identical to her second amended petition in that it left intact the ultimate relief sought (voiding prior issuances of shares and damages for value of stock, for excessive compensation, and for undeclared dividends), even though the formal prayer was changed to request damages only. On December 21, 1990, over the

defendants' objections, the trial court granted leave to file the plaintiff's third amended petition changing the case to one of law, requiring trial by jury. Previously, on November 1, 1990, the trial court had determined the case was of equitable cognizance.

The remedy of voiding stock issued in violation of a shareholder's preemptive rights is equitable in nature. 18A Am. Jur. 2d *Corporations* § 536 (1985). A cause of action for excessive compensation is properly brought in a court of equity, and a proceeding to compel payment of dividends is of an equitable nature. 5A William Meade Fletcher, Fletcher Cyclopedia of the Law of Private Corporations § 2171 (perm. ed. 1987); 11 Fletcher, *supra*, § 5326 (perm. ed. 1986).

While the plaintiff's third amended petition requests only damages, the theories presented in her case are a mixture of legal and equitable causes of action, and the trial court erred in changing this case from one in equity to one at law. When equity acquires jurisdiction of an action, it will retain it for all purposes until the litigation is completely and finally determined. *Brtek v. Cihal*, 245 Neb. 756, 515 N.W.2d 628 (1994); *Workman v. Workman*, 167 Neb. 857, 95 N.W.2d 186 (1959).

When reviewing a question of law, an appellate court is obligated to reach a conclusion independent of the trial court's ruling. See *Central States Resources v. First Nat. Bank*, 243 Neb. 538, 501 N.W.2d 271 (1993).

> In an appeal of an equitable action . . . an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, an appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.

Wolf v. Degner, 243 Neb. 702, 702-03, 502 N.W.2d 440, 441 (1993).

The record on the statute of limitations trial shows the following facts:

Prior to 1960, the Company was run by Ignatius and

Charles, and Vita worked for the Company until 1960. The individual defendants took over management of the Company in the early 1960's.

On June 21, 1961, stock certificate No. 48 of the Company was issued to the plaintiff, conveying 10 shares of stock. In 1962, Ignatius purchased the 10 shares from the plaintiff for $1,000, par value of $100 per share. This transaction is reflected in stock certificate No. 48, in stock certificate No. 52, in the Company's capital stock ledger, and in the personal accounts of Ignatius and the plaintiff. There is no evidence that the individual defendants had anything to do with the transactions between Ignatius and the plaintiff involving the transfer of the 10 shares.

Ignatius died on November 6, 1965. Ignatius' estate, which included 433½ shares of Company stock, was distributed in 1967 by Charles and Samuel, the coexecutors. Dorothy declined to take under Ignatius' will, electing to take her one-third statutory share, leaving the individual defendants and the plaintiff each one-sixth of the estate. That statutory distribution was confirmed by a decree filed in the county court for Douglas County on February 8, 1967.

Receipts filed in the probate proceeding and signed by the individual defendants, the plaintiff, and their mother, Dorothy, confirm each received his or her statutory share of Ignatius' estate. The assets of Ignatius' estate, which totaled $85,371.45, were distributed pursuant to a distribution agreement dated May 17, 1967. That agreement shows that the plaintiff received her one-sixth share of $13,857.84 in cash via two payments, one, a $5,000 check payable to the plaintiff, the other, a deposit of $8,857.84 in the plaintiff's emergency multiple sclerosis account at the Company.

Dorothy received $29,940.09 from Ignatius' estate, which included a promissory note from the individual defendants for $20,655.41 for her one-third share of Ignatius' stock in the Company. On September 15, 1967, Dorothy forgave the individual defendants' note and made a gift of cash to the plaintiff in the amount of $6,885.14, which was placed in the plaintiff's personal account at the Company.

Charles died on March 8, 1974. His estate, including 489½

shares of Company stock, was distributed by the coexecutors, Samuel and Joseph.

Charles left one-half of his estate outright to Vita and the other one-half to Samuel and Joseph as trustees for Vita for life. Upon Vita's death, three-fourths of the trust was to go to the individual defendants outright, the remaining one-fourth to Samuel and Joseph in trust for the plaintiff for life. Upon the plaintiff's death, the balance of the trust estate was to go outright to the individual defendants.

On February 17, 1976, the Company reissued to Vita the 244 3/4 shares left to her outright. Vita decided to give those shares to the individual defendants and to give the plaintiff a cash equivalent. The 244 3/4 shares were reissued, with 61 shares to Samuel, 61 to Joseph, 61 to Carl, and 61 3/4 to the plaintiff. On June 11, 1976, the plaintiff's 61 3/4 shares were reacquired as treasury shares, and the Company paid the plaintiff $6,175, the par value for her shares.

Vita testified that she gave the individual defendants the stock and the plaintiff money. Vita stated that the plaintiff went to her house after receiving the check, showed the check to Vita, and thanked Vita for the money.

Vita also gave the individual defendants her life interest in the 244 3/4 shares held in trust. On June 15, 1979, Samuel and Joseph, as trustees, caused such shares to be reissued, 82 shares to Samuel, 81 3/4 shares to Joseph, and 81 shares to Carl. The individual defendants did not discuss this with the plaintiff. They meant to give her a like amount of money, but there is nothing to indicate that they ever did.

Dorothy died in 1980. Dorothy left the balance of her estate, including 60 shares of Company stock, to the individual defendants as cotrustees in trust for the plaintiff for her life. The cotrustees were given unlimited discretion. Upon the plaintiff's death, one-fourth of the trust goes to each of the individual defendants and one-eighth to each of the plaintiff's two children.

The 60 shares of Company stock in Dorothy's estate were surrendered to the Company and retired as treasury stock. Dorothy's estate was paid $7,842.60, $130.71 per share, for the stock. These transactions are reflected in the documents

pertaining to Dorothy's estate.

Notice of all of the various estate proceedings was given pursuant to law. The plaintiff's personal files contained copies of documents relating to all three estates at issue, and the plaintiff's signature appeared on a variety of the estate documents.

The plaintiff also knew that she had money at the Company. The Company provided her with a car and health insurance. The plaintiff gave Samuel her medical bills for payment through her personal accounts, and she received from Samuel checks from the Dorothy Ancona trust. The plaintiff was sent annual Internal Revenue Service Forms 1099 showing interest income received from those accounts, and she was sent annual confirmation letters from the Company's outside auditors confirming the amounts in those accounts. Furthermore, the plaintiff's daughter, who is in daily contact with the plaintiff and assists her with business matters, testified that in 1981, she discussed the plaintiff's personal accounts at the Company with Samuel.

The plaintiff is a college graduate. Although she has multiple sclerosis, and the plaintiff's locomotion is affected by the multiple sclerosis, it does not affect her mental functions.

The plaintiff did not ask the individual defendants or anyone else associated with the Company for information concerning her interests in the Company. The defendants did not discuss Company business with the plaintiff.

In 1987, when Samuel informed the plaintiff she needed to cut back on her in-home companion care because she was running out of money, the plaintiff gave her ex-husband an irrevocable durable power of attorney to try to find out what had happened to her money. After the filing of accounting actions in the Charles Ancona trust and the Dorothy Ancona trust, this action was filed on March 1, 1989.

In this case, with the exception of the allegation made in paragraph 12(i), the plaintiff has failed to show that the defendants concealed any facts which would have put the plaintiff on notice of any cause of action. In paragraph 12(i), the plaintiff alleges that without her knowledge or consent, Samuel and Joseph caused the 244 3/4 shares in the Charles

Ancona trust to be transferred to the Company without any consideration and that the individual defendants thereafter reissued those shares to themselves without any stock or value being transferred to the plaintiff or to the Charles Ancona trust. The evidence shows that Samuel and Joseph did make this alleged transfer without notifying the plaintiff and without transferring anything of value to her or the trust. As trustees of the trust of which the plaintiff was a beneficiary, Samuel and Joseph had a fiduciary duty to disclose this information to the plaintiff.

Generally, for fraudulent concealment to delay running of the statute of limitations, the concealment must be manifested by an affirmative act or misrepresentation. *Lumber Village v Siegler*, 135 Mich. App. 685, 355 N.W.2d 654 (1984). However, if a trust or confidential relationship exists between the parties, which imposes a duty to disclose, mere silence by the party with a duty to disclose constitutes fraudulent concealment. *Conway v. Conway*, 487 N.W.2d 21 (S.D. 1992).

Evidence adduced at the jury trial of this case shows that the individual defendants returned the 244 3/4 shares of stock to the trust sometime after this action was filed. At oral argument before this court, the individual defendants admitted that they had a duty to disclose this transaction to the plaintiff and that they failed to do so.

Regarding the remaining allegations in paragraph 12, the plaintiff has failed to show that the defendants fraudulently concealed any facts which would have put her on notice of any cause of action against them. With regard to the stock issuances, which occurred in 1965, 1966, 1968, and 1969, that the plaintiff claims were in violation of her preemptive rights, the defendants had no duty to disclose these transactions to her, because the evidence shows she had no stock ownership in the Company. As to the remaining allegations in paragraph 12 which are facially barred by the statute of limitations, the evidence established that the means of knowledge were at hand to put the plaintiff on inquiry as to any cause of action she might have had against the defendants. See, *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.*, 244 Neb. 408, 507 N.W.2d 275 (1993); *League v. Vanice*, 221 Neb. 34, 374 N.W.2d

849 (1985).

Except for claims in paragraph 12(i) against the individual defendants who were fiduciaries, and those claims alleged in paragraph 12(k) which were withdrawn prior to trial and occurred on or after March 1, 1985, the plaintiff's cause of action was barred on its face by the statute of limitations and should have been dismissed because the plaintiff failed to allege and prove any excuse to avoid the statute of limitations.

It is unnecessary to consider the other assignments of error.

For the reasons discussed herein, the judgment is reversed and the cause remanded for further proceedings against the individual defendants Samuel A. Ancona and Joseph I. Ancona with respect to the claim stated in paragraph 12(i) of the plaintiff's petition. The petition is dismissed as to the defendants Carl Ancona and Ancona Bros. Co.

APPEAL DISMISSED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

HASTINGS, C.J., WHITE, CAPORALE, and WRIGHT, JJ., not participating.

JACK WICKER, APPELLANT, V. ARTHUR VOGEL, APPELLEE.
521 N.W.2d 907

Filed September 23, 1994. No. S-92-591.

1. **Motions for New Trial.** A motion for new trial directed to a nonfinal order is a nullity, as is any ruling on such a motion.
2. **Res Judicata: Judgments.** The doctrine of res judicata bars the relitigation of a matter that has been directly addressed or necessarily included in a former adjudication if (1) the former judgment was rendered by a court of competent jurisdiction, (2) the former judgment was a final judgment, (3) the former judgment was on the merits, and (4) the same parties or their privies were involved in both actions.
3. **Appeal and Error.** Under the law-of-the-case doctrine, the holdings of the appellate court on questions presented to it in reviewing proceedings of the trial court become the law of the case; those holdings conclusively settle, for purposes

of that litigation, all matters ruled upon, either expressly or by necessary implication.

Appeal from the District Court for Otoe County: RONALD E. REAGAN, Judge. Affirmed.

Charles D. Hahn for appellant.

Richard H. Hoch, of Hoch & Steinheider, for appellee.

HASTINGS, C.J., WHITE, CAPORALE, FAHRNBRUCH, and LANPHIER, JJ., and BOSLAUGH, J., Retired.

CAPORALE, J.

Claiming to be the owner of certain real estate, the plaintiff and present appellant, Jack Wicker, seeks to eject the defendant and present appellee, Arthur Vogel, therefrom. In a bifurcated trial reserving the issue of damages, the district court entered judgment on the verdict determining that Wicker was entitled to possession of the premises. After Vogel's motion for new trial was overruled, he appealed to this court. Because the judgment did not deal with the issue of damages, it did not dispose of all the material issues in the case and therefore was not a final order. Consequently, we dismissed the appeal for lack of jurisdiction. *Wicker v. Waldemath*, 238 Neb. 515, 471 N.W.2d 731 (1991). (Although one Ronald Waldemath, doing business as Waldemath Farms, Inc., was at one time a party to this action, he no longer is such.) Through a successor judge, the district court thereafter sustained Wicker's motion to dismiss his claim for damages. Vogel thereupon once again moved for a new trial. This time the district court, through the successor judge, sustained Vogel's motion, and Wicker appealed to the Nebraska Court of Appeals, claiming that the grant of a new trial was contrary to law. We thence, on our own motion, removed the matter to this court, under our authority to regulate the caseloads of the state's appellate tribunals. For the reasons hereinafter stated, we now affirm the judgment of the district court.

Wicker makes two contentions: first, that having been made years after judgment was initially entered on the verdict, the motion giving rise to this appeal was untimely, and second, that the overruling of the first motion bars a different ruling on the

subject motion.

As to Wicker's first contention, it is true that Neb. Rev. Stat. § 25-1143 (Reissue 1989) provides, in relevant part, that an "application for a new trial must be made, within ten days . . . after the . . . decision was rendered . . . ." However, Wicker overlooks the fact that since the initial judgment did not constitute a final order, it was a nullity so far as any appeal was concerned. *Wicker, supra.* That being so, Vogel's motion for a new trial at that point was likewise a nullity, as was the district court's ruling thereon. See, *State ex rel. Kaipus v. Board of Trustees of S. & I. Dist. No. 113*, 200 Neb. 525, 264 N.W.2d 422 (1978), *overruled on other grounds, Pfeiffer v. Pfeiffer*, 203 Neb. 137, 277 N.W.2d 575 (1979) (motion for new trial prematurely made is ineffectual); *Spanheimer Roofing & Supply Co. v. Thompson*, 198 Neb. 710, 255 N.W.2d 265 (1977), *overruled on other grounds, Pfeiffer, supra* (motion for new trial made before all material issues resolved is premature).

On the other hand, when the district court dismissed Wicker's claim for damages, the judgment on the verdict from that moment on became final and appealable, for it then resolved all the material issues before the district court. Inasmuch as Vogel filed his second motion for new trial within 10 days after entry of the second judgment on the verdict, the motion was timely.

We thus reach Wicker's second contention, in which he asserts that the doctrine of res judicata precludes the sustainment of a second motion for new trial when the first such motion was overruled.

The doctrine bars the relitigation of a matter that has been directly addressed or necessarily included in a former adjudication if (1) the former judgment was rendered by a court of competent jurisdiction, (2) the former judgment was a final judgment, (3) the former judgment was on the merits, and (4) the same parties or their privies were involved in both actions. *Smith v. Smith, ante* p. 193, 517 N.W.2d 394 (1994). Whatever else might be said about the applicability of the doctrine, it is obvious not only that there was no former final judgment, but that the parties are involved in but one action. The doctrine simply does not fit the situation.

Neither does the law-of-the-case doctrine apply. Under that doctrine, the holdings of the appellate court on questions presented to it in reviewing proceedings of the trial court become the law of the case; those holdings conclusively settle, for purposes of that litigation, all matters ruled upon, either expressly or by necessary implication. *First Nat. Bank of Omaha v. State*, 241 Neb. 267, 488 N.W.2d 343 (1992). Once again, the difficulty is that Vogel's first motion for new trial was ineffectual. Thus, the district court's denial of a new trial on that motion could have no effect on the second motion.

There is authority for the proposition that a successor judge should respect a decision made by a predecessor judge on the same case. *Carmichaels Arbors Associates v. U.S.*, 789 F. Supp. 683 (W.D. Pa. 1992); *United States v. Wheeler*, 256 F.2d 745 (3d Cir. 1958), *cert. denied* 358 U.S. 873, 79 S. Ct. 111, 3 L. Ed. 2d 103; *TCF Film Corporation v. Gourley*, 240 F.2d 711 (3d Cir. 1957). However, the concept is more a statement of policy than a reflection of the limits of the successor judge's power. See *Slotkin v. Citizens Cas. Co. of New York*, 614 F.2d 301 (2d Cir. 1979). Indeed, Wicker cites no authority for his notion that a trial court cannot, during the course of a proceeding, change its interlocutory rulings, and we are aware of none. The important consideration is that the ultimate ruling be legally correct. Wicker makes no claim that on the merits it was error to grant a new trial.

AFFIRMED.

WRIGHT, J., participating on briefs.

NATIONAL ACCOUNT SYSTEMS OF LINCOLN, INC., A NEBRASKA CORPORATION, APPELLANT, V. ROBERT VERGITH, APPELLEE.

521 N.W.2d 910

Filed September 23, 1994. No. S-92-989.

1. **Judgments: Appeal and Error.** As to questions of law, an appellate court has an obligation to reach a conclusion independent from a trial court's conclusion in a judgment under review.

2. **Divorce: Child Support: Liability: Presumptions.** When, in a divorce action, there has been a judicial ascertainment of the amount the noncustodial parent should pay for the support of the minor children, that amount is presumed to be just and reasonable until it is reversed or modified by a subsequent order of the court. The amount thus ascertained, so long as the decree remains in full force, is the legal measure of the noncustodial parent's liability for the support of such children.

Appeal from the District Court for Lancaster County, WILLIAM D. BLUE, Judge, on appeal thereto from the County Court for Lancaster County, RICHARD H. WILLIAMS, Judge. Judgment of District Court affirmed.

James A. Cada for appellant.

Dana M. London for appellee.

HASTINGS, C.J., WHITE, CAPORALE, FAHRNBRUCH, and LANPHIER, JJ., and BOSLAUGH, J., Retired.

BOSLAUGH, J., Retired.

National Account Systems of Lincoln, Inc. (National), sued Robert Vergith to collect hospitalization expenses incurred by Vergith's daughter. The county court for Lancaster County held, and the district court affirmed, that Vergith was not responsible for the expenses because he is a noncustodial parent who pays child support. The county court held that the child support obligation defines the extent of his duty to pay for the child's expenses. After the district court affirmed, the plaintiff, National, appealed.

Vergith was divorced in 1976. The divorce decree granted custody of the son from the marriage to Vergith, and of the daughter, Jaymi, to Vergith's former wife. Vergith was ordered to pay $50 per month for the support of Jaymi. Jaymi received nonemergency medical services in Lincoln General Hospital from May 1990 to January 1991. Vergith was not consulted regarding the treatment of his daughter and did not agree to pay for the treatment. The total cost of the treatment was $10,973.20. Payments from insurance and other sources were made to the hospital, and the balance due the hospital was $1,781.84 at the time the suit was commenced.

National, as assignee of the hospital, sought to recover the

balance due from Vergith, claiming that a father is liable to third parties that provide necessaries, regardless of marital or custodial status. The case was tried on stipulated facts. The only question before the trial court, and now before this court, is whether a noncustodial parent who has had a child support obligation assessed against him is liable to third parties who provide necessaries to minor children.

Because the facts are not in dispute, the question before this court is a question of law. As to questions of law, an appellate court has an obligation to reach a conclusion independent from a trial court's conclusion in a judgment under review. *Lindsay Mfg. Co. v. Universal Surety Co., ante* p. 495, 519 N.W.2d 530 (1994). See, also, *Kozeny v. Miller*, 243 Neb. 402, 499 N.W.2d 75 (1993).

This court has not previously addressed this particular question, but has addressed a similar situation. In *Dimond v. State*, 110 Neb. 519, 194 N.W. 725 (1923), criminal child neglect charges were filed against the former husband, alleging that he had failed to properly support his children. The former husband had paid his court-ordered child support payments. The district court entered judgment against the father, who appealed. This court reversed the district court, stating:

> When, in a divorce action, there has been . . . a judicial ascertainment of the amount the father should pay for the support of his minor children, that amount is presumed to be just and reasonable until it is reversed or modified by a subsequent order of the court. The amount thus ascertained, so long as the decree remains in full force, is, in this state, the legal measure of the father's liability for the support of such children.

Dimond, 110 Neb. at 520-21, 194 N.W. at 725.

In *Dimond*, the court did not state whether the limitation of the noncustodial parent's liability was exclusive to the custodial parent or was extended to include third parties, or whether civil liability was limited by the divorce decree. A split of authority has developed among the courts of other states which have determined the liability of noncustodial parents to third parties who provide necessaries for minors. See Annot., Support Provisions of Judicial Decree or Order as Limit of Father's

Liability for Expenses of Child, 7 A.L.R.2d 491 (1949).

National cites three sources for the proposition that noncustodial parents are liable to third parties who provide necessaries. First, National cites a statute which provides that parents are responsible for medical bills incurred at county hospitals; no mention is made about custodial status. National claims that the statute is an indication that the Legislature requires both parents to take care of their children's medical care. In fact, the statute is a reflection of the Legislature's desire to see that county hospitals not be deprived of payment.

National cites as its second authority the opinion of this court in *Welke v. Welke*, 205 Neb. 426, 288 N.W.2d 41 (1980). In *Welke*, we held that a wife could not recover a child's past medical expenses from her former husband where the husband was not required to pay for medical expenses in the support decree. We also stated that it was "not necessary to decide whether the decree [established a] limitation from a legal standpoint on the father's liability to provide for his children." *Id.* at 429, 288 N.W.2d at 43. National claims that the statement shows that the court did not consider the ruling in *Dimond, supra*, controlling in matters between a third-party provider of necessaries and noncustodial parents.

Finally, and most strenuously, National argues that the court should adopt the reasoning in *Alamance County Hospital v. Neighbors*, 315 N.C. 362, 338 S.E.2d 87 (1986). In *Neighbors*, the North Carolina Supreme Court held that noncustodial parents were liable to third-party providers of necessaries received by the parents' children. The court stated that the "duty of support is . . . an obligation imposed by law which arises from his status as [a parent]." *Id.* at 365, 338 S.E.2d at 89. The court also stated that "the right of the third party provider of goods or services to claim against the non-custodial parent also continues, unimpaired by contracts or judicial decrees or orders affecting the relations between the parents." *Id.* at 369, 338 S.E.2d at 92.

Whatever the merits of National's authorities, they do not adequately respect the judicial responsibility to maintain the integrity of support orders. A judicial method of seeking additional support from a noncustodial parent has been created

by the Legislature. See Neb. Rev. Stat. § 42-364 (Reissue 1988). Since the Legislature provided the avenue by which the changing needs of children can be met, we will not augment it by judicially created remedies.

We find that the need to preserve the integrity of support orders will be best fulfilled by extending the *Dimond* rule to civil liability, including third-party providers of necessaries. Unless the custodial parent has sought a modification of the support order, the amount set in the decree of dissolution is the legal measure of the noncustodial parent's liability for the support of children. Such liability will not be changed without a judicial modification of the decree of dissolution.

The trial court correctly stated that the proper means of seeking reimbursement for nonemergency medical care is through a modification of the support order. The judgment of the district court is affirmed.

AFFIRMED.

WRIGHT, J., participating on briefs.

JOSEPHINE UPAH, APPELLEE, V. ANCONA BROS. CO. ET AL., APPELLANTS.

521 N.W.2d 906

Filed September 23, 1994. No. S-93-729.

Judgments: Appeal and Error. Generally, an order, judgment, or proceeding dependent on, or ancillary and accessory to, a judgment, order, or decree which is reversed shares its fate and falls with it.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Reversed and vacated.

Jerrold L. Strasheim and Mary L. Swick, of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, for appellant Ancona Bros. Co.

Fredric H. Kauffman and Gregory S. Heier, of Cline, Williams, Wright, Johnson & Oldfather; Allen E. Daubman, of Koley, Jessen, Daubman & Rupiper, P.C.; and Thomas R. Burke and Raymond E. Walden, of Kennedy, Holland, DeLacy & Svoboda, for appellants Samuel A. Ancona, Joseph I. Ancona, and Carl Ancona.

William Jay Riley, Daniel J. Wintz, and Gerald L. Friedrichsen, of Fitzgerald, Schorr, Barmettler & Brennan, P.C., for appellee.

BOSLAUGH, FAHRNBRUCH, and LANPHIER, JJ., and SIEVERS, Chief Judge, and CONNOLLY, HANNON, and IRWIN, Judges.

BOSLAUGH, J.

This case involves the attempts of the plaintiff, Josephine (Ancona) Upah, to collect on a $3,766,000 judgment awarded to her against the individual defendants, Samuel A. Ancona, Joseph I. Ancona, and Carl Ancona, and the corporate defendant, Ancona Bros. Co. (Company). The judgment of $3,766,000 entered against the defendants was not superseded and has not been satisfied.

The defendants' appeal from that judgment to this court resulted in a reversal of the judgment, and the cause was remanded for further proceedings against Samuel A. Ancona and Joseph I. Ancona with respect to the plaintiff's claim that they transferred 244 3/4 shares from the Charles Ancona trust to the Company and then reissued those shares to themselves and Carl Ancona without any notification to the plaintiff and without any consideration being transferred to the trust. See *Upah v. Ancona Bros. Co., ante* p. 585, 521 N.W.2d 895 (1994).

In the present case, the individual defendants appealed from separate orders of the district court granting the plaintiff's motions for orders in aid of execution. The orders directed that when any property or money is distributed to or for the benefit of the individual defendants from the Company's profit-sharing plan, such property or money shall be applied by the individual defendants toward satisfaction of the judgment in favor of the plaintiff and against the individual defendants. The orders also forbid and enjoin the individual defendants

from transferring or otherwise disposing of such property or money and from interfering with such property or money when distributed to the individual defendants from the plan.

The Company also appealed from the order of the district court granting the plaintiff's motion for order in aid of execution with respect to certain evidences of indebtedness owed by the Company to the individual defendants and others.

Generally, an order, judgment, or proceeding dependent on, or ancillary and accessory to, a judgment, order, or decree which is reversed shares its fate and falls with it. *Luschen Bldg. Assn. v. Fleming Cos.*, 226 Neb. 840, 415 N.W.2d 453 (1987). Because of our decision in *Upah v. Ancona Bros. Co., supra*, we reverse and vacate the orders of the district court granting the plaintiff's motions for orders in aid of execution.

REVERSED AND VACATED.

HASTINGS, C.J., WHITE, CAPORALE, and WRIGHT, JJ., not participating.

STATE OF NEBRASKA, APPELLEE, V. CARLA PHILIPPS, APPELLANT.
521 N.W.2d 913

Filed September 23, 1994. No. S-93-1035.

1. **Constitutional Law: Statutes: Appeal and Error.** The alleged unconstitutionality of a statute presents a question of law which must be determined by a reviewing court independent from the conclusion reached by the inferior court.
2. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality.
3. **Constitutional Law: Criminal Law: Statutes.** A penal statute must be construed so as to meet constitutional requirements if such can reasonably be done.
4. **Constitutional Law: Statutes: Proof.** One claiming that a statute is unconstitutional has the burden to show that such is the case.
5. _____: _____: _____. The unconstitutionality of a statute must be clearly established before a court may declare it void.
6. **Constitutional Law.** Neb. Const. art. II, § 1, prohibits one department of government from encroaching on the duties and prerogatives of the others or from improperly delegating its own duties and prerogatives, except as the Constitution otherwise directs or permits.
7. **Sentences.** The essence of commutation is the substitution of a milder punishment.

8. **Constitutional Law: Sentences.** Neb. Rev. Stat. § 29-2308.01 (Reissue 1989) is unconstitutional and therefore unenforceable, as it purports to grant commutation power to the judiciary, in violation of Neb. Const. art. IV, § 13, which entrusts such power to the Board of Pardons.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Affirmed.

Mark E. Ford for appellant.

Don Stenberg, Attorney General, and J. Kirk Brown for appellee.

HASTINGS, C.J., WHITE, CAPORALE, and LANPHIER, JJ., and SIEVERS, Chief Judge, and BOSLAUGH, J., Retired, and RONIN, D.J., Retired.

CAPORALE, J.

I. STATEMENT OF CASE

After the sentences imposed upon the defendant-appellant, Carla Philipps, were found by this court not to be excessive and were thus affirmed in *State v. Philipps*, 242 Neb. 894, 496 N.W.2d 874 (1993), the district court, on its own motion, set a hearing to determine whether the sentences should nonetheless be reduced under the provisions of the resentencing statute found in Neb. Rev. Stat. § 29-2308.01 (Reissue 1989). Upon the challenge of the plaintiff-appellee State, the district court determined that the resentencing statute violates the separation of powers clause contained in Neb. Const. art. II, § 1, and declined to reduce the sentences. The matter involving the constitutionality of a statute, Philipps properly appealed directly to this court (see Neb. Const. art. V, § 2). We affirm.

II. SCOPE OF REVIEW

The alleged unconstitutionality of a statute presents a question of law which must be determined by a reviewing court independent from the conclusion reached by the inferior court. *State v. Schmailzl*, 243 Neb. 734, 502 N.W.2d 463 (1993); *State v. Crowdell*, 234 Neb. 469, 451 N.W.2d 695 (1990); *State ex rel. Spire v. Northwestern Bell Tel. Co.*, 233 Neb. 262, 445 N.W.2d 284 (1989).

However, it must be remembered that in making such a

determination, a statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality. *Henry v. Rockey, ante* p. 398, 518 N.W.2d 658 (1994); *In re Application A-16642*, 236 Neb. 671, 463 N.W.2d 591 (1990); *State v. Kipf*, 234 Neb. 227, 450 N.W.2d 397 (1990). More specifically, a penal statute must be construed so as to meet constitutional requirements if such can reasonably be done. See *id.* One claiming that a statute is unconstitutional has the burden to show that such is the case. See, *Henry v. Rockey, supra*; *State v. Schmailzl, supra*; *State v. LaChapelle*, 234 Neb. 458, 451 N.W.2d 689 (1990). Moreover, the unconstitutionality of a statute must be clearly established before a court may declare it void. *State v. LaChapelle, supra*; *State v. Kipf, supra*; *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987).

III. ANALYSIS

The resentencing statute was enacted in 1986 (1986 Neb. Laws, L.B. 530) and provides for the reduction by the sentencing court of the sentence it previously imposed, as follows:

> Any court which imposes a sentence for a criminal offense may reduce such sentence within one hundred twenty days after (1) the sentence is imposed or probation is revoked or (2) receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal. No hearing shall be required concerning any request for reduction denied under this section.

§ 29-2308.01.

Prior to the enactment of the resentencing statute, we had held that a sentence validly imposed took effect from the time pronounced and that thus, a subsequent sentence fixing a different term was a nullity. *State v. Temple*, 230 Neb. 624, 432 N.W.2d 818 (1988); *State v. Christiansen*, 217 Neb. 740, 351 N.W.2d 67 (1984); *State v. Kinney*, 217 Neb. 701, 350 N.W.2d 552 (1984) (trial court erred in vacating sentence of probation and imposing sentence of imprisonment); *State v. Snider*, 197 Neb. 317, 248 N.W.2d 342 (1977), *overruled on other grounds, State v. Cousins*, 208 Neb. 245, 302 N.W.2d 731 (1981) (resentencing by trial judge obviously unhappy with

defendant's exit after sentencing was nullity).

But we noted in *State v. Horr*, 232 Neb. 380, 441 N.W.2d 139 (1989), that the resentencing statute had modified that earlier rule and granted to those sentenced the right to petition the sentencing court for reconsideration, even if an appellate mandate had affirmed the original sentence. As the trial court, the county court in *Horr* had sentenced the defendant to a term of imprisonment of 6 months. The defendant appealed to the district court, which, finding the sentence not excessive, affirmed the county court's judgment. We affirmed the district court's judgment. Thereafter, the county court, on the defendant's motion, reduced the sentence pursuant to the resentencing statute. The State then appealed. In affirming the reduced sentence, we reasoned that the issuance of our mandate to the district court and its entry of judgment thereon reinvested the county court with jurisdiction to reconsider its original sentence.

Distinguishing that situation from one in which the sentence was given plenary review, we, in *State v. Foral*, 240 Neb. 346, 481 N.W.2d 583 (1992), held that where we found a sentence to be excessively lenient and specified the sentence to be imposed on remand, the resentencing statute did not empower the sentencing court to impose a different sentence than the one we specified. We also suggested that perhaps the holding in *State v. Horr, supra*, should be revisited.

With that background, we turn our attention to whether, as the State claims, the resentencing statute violates the separation of powers clause of our Constitution by giving the judiciary the power to commute sentences, a power clearly entrusted by Neb. Const. art. IV, § 13, to an executive department board consisting of the Governor, Attorney General, and Secretary of State, commonly known as the Board of Pardons. See, e.g., Neb. Rev. Stat. § 29-2524 (Reissue 1989). Article IV, § 13, reads in relevant part: "The Governor, Attorney General and Secretary of State, sitting as a board, shall have power to . . . grant . . . commutations in all cases of conviction for offenses against the laws of the state . . . ."

The separation of powers clause specifies that the powers of this state's government "are divided into three distinct

departments, the legislative, executive and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted." Article II, § 1. The purpose of the clause is to establish the permanent framework of our system of government and to assign to the three departments their respective powers and duties, and to establish certain fixed principles upon which our government is to be conducted. *State, ex rel. Randall, v. Hall*, 125 Neb. 236, 249 N.W. 756 (1933).

Citing to *Mistretta v. United States*, 488 U.S. 361, 109 S. Ct. 647, 102 L. Ed. 2d 714 (1989), a decision concerning the federal Constitution, Philipps contends that the three branches need not operate entirely separately and distinctly from each other, but may have overlapping responsibility. That contention, however, overlooks that unlike our Constitution, the federal Constitution has no express provision which prohibits the officials of one branch of government from exercising the functions of the other branches. The federal separation of powers principle is inferred from the overall structure of the U.S. Constitution. In contrast, Neb. Const. art. II, § 1, prohibits one department of government from encroaching on the duties and prerogatives of the others or from improperly delegating its own duties and prerogatives, except as the Constitution itself otherwise directs or permits. See *Otey v. State*, 240 Neb. 813, 485 N.W.2d 153 (1992). Thus, the federal doctrine is not as rigorous as that imposed by the Constitution of this state. See *State v. Hunter*, 447 A.2d 797 (Me. 1982).

As a consequence, in *State ex rel. Spire v. Conway*, 238 Neb. 766, 472 N.W.2d 403 (1991), article II, § 1, precluded a state senator from simultaneously serving as an executive department assistant professor at a state college, notwithstanding his unpaid leaves of absence from the college during the Legislature's regular sessions and his removal from the college payroll during most of the Legislature's special sessions.

Nonetheless, as Philipps points out, some courts have concluded that statutes which empower a sentencing court to reexamine and reduce its initial sentence do not intrude upon

the executive prerogative of commutation. See, e.g., *United States v. Benz*, 282 U.S. 304, 51 S. Ct. 113, 75 L. Ed. 354 (1931); *Mamula v. People*, 847 P.2d 1135 (Colo. 1993); *Shimley v. State*, 87 Okla. Crim. 179, 196 P.2d 526 (1948). The court in *State v. Nardini*, 187 Conn. 109, 123-24, 445 A.2d 304, 312 (1982), observed:

> Nor can it be seriously argued that such enabling legislation authorizes the judicial department to exercise the pardoning power. "The power exercised . . . does not constitute a pardon or commutation. It is in effect only a change of judgment, and for that reason a radically different thing from a pardon or commutation, which import that the sentence stands while the sentenced person is relieved from its operation upon him. The gist of that which the statute authorizes is that the pronouncement of the court may be changed, not that a way of escape from it is provided."

But determining whether an act is one of commutation on the basis of who performs it begs the question; the essence of commutation is the substitution of a milder punishment. See *Lincoln v. Sigler*, 183 Neb. 347, 160 N.W.2d 87 (1968). Thus, in *Boston v. Black*, 215 Neb. 701, 340 N.W.2d 401 (1983), we wrote that to interpret a statute such that it would reduce, without the approval of the Board of Pardons, a sentence imposed prior to its enactment would render the statute unconstitutional, for it would permit a legislative invasion of the power of commutation constitutionally consigned to the board. See, also, *Stewart v. Clarke*, 240 Neb. 397, 482 N.W.2d 248 (1992).

It is true that under the provisions of Neb. Rev. Stat. § 29-2308 (Cum. Supp. 1992), we have reduced sentences imposed by the trial courts which were excessive, e.g., *State v. Spiegel*, 239 Neb. 233, 474 N.W.2d 873 (1991), and *State v. Suggett*, 200 Neb. 693, 264 N.W.2d 876 (1978), and that under Neb. Rev. Stat. § 29-2320 (Cum. Supp. 1992), we have increased sentences imposed by the trial courts which were excessively lenient, e.g., *State v. Wojcik*, 238 Neb. 863, 472 N.W.2d 732 (1991), and *State v. Winsley*, 223 Neb. 788, 393 N.W.2d 723 (1986). But an appellate court which modifies a

sentence on review, which is demonstrated to constitute an abuse of discretion, operates within the confines of an unconcluded judicial process. In contrast, a sentencing court which chooses to substitute a milder punishment for the sentence it had originally imposed does the very thing which defines an act of commutation.

IV. JUDGMENT

Section 29-2308.01 is unconstitutional and therefore unenforceable, as it purports to grant commutation power to the judiciary, in violation of Neb. Const. art. IV, § 13, which entrusts such power to the Board of Pardons.

Accordingly, as noted in part I, the judgment of the district court is affirmed.

AFFIRMED.

FAHRNBRUCH and WRIGHT, JJ., not participating.

STATE OF NEBRASKA, ON BEHALF OF B.A.T., A MINOR CHILD, APPELLEE, V. S.K.D., APPELLANT.

522 N.W.2d 393

Filed September 30, 1994. No. S-92-491.

1. **Minors: Words and Phrases.** A next friend is one who, in the absence of a guardian, acts for the benefit of an infant.
2. **Child Support.** The State may bring an action on behalf of a minor for future support.

Appeal from the District Court for Pierce County: ROBERT B. ENSZ, Judge. Affirmed.

Hal W. Anderson, of Berry, Anderson, Creager & Wittstruck, for appellant.

Eugene L. Kelly for appellee.

HASTINGS, C.J., WHITE, CAPORALE, FAHRNBRUCH, and LANPHIER, JJ., and BOSLAUGH, J., Retired.

HASTINGS, C.J.

In this paternity action, S.K.D. appeals the judgment of the district court finding that he was the father of B.A.T., a minor child, born January 25, 1982, and ordering him to pay certain monthly support and to provide medical insurance for the benefit of the minor child. The action was brought by the State of Nebraska on behalf of the minor child. S.K.D. appeals, assigning as the sole error that the trial court failed to find that the action was barred by the statute of limitations.

Neb. Rev. Stat. § 43-1411 (Reissue 1988) provides as follows:

> A civil proceeding to establish the paternity of a child may be instituted, in any district court of the district where the child is domiciled or found, by (1) the mother or the alleged father of such child, either during pregnancy or within four years after the child's birth . . . or (2) the guardian or next friend of such child within eighteen years after the child's birth.

The petition in this case was filed on July 11, 1991. S.K.D. contends that the State is attempting to circumvent the applicable statute of limitations by substituting itself for the mother whose claim would have been barred.

In *Doak v. Milbauer*, 216 Neb. 331, 343 N.W.2d 751 (1984), the mother of a minor child sought to bring an action for support against the putative father more than 4 years after the birth of the child. Neb. Rev. Stat. § 13-111 (Reissue 1977), the predecessor to § 43-1411, provided in part that the action might be brought by the mother "within four years after its [the child's] birth, or by the guardian [ad litem] or next friend of such child." The mother contended that the statute as it existed was unconstitutional because it denied to children born out of wedlock due process and equal protection of the law. We rejected that argument, pointing out that

> [e]ven if the statute were subject to the construction that the child's, as well as the mother's, action is barred 4 years after the child's birth, and we believe it is not, it would be our obligation to adopt the constitutional construction we suggested earlier. . . .
>
> We need not, and therefore do not, determine at this

> time what is recoverable by whom once paternity is established. It is sufficient to observe for the present that, for example, the owner of the right to recover for past medical expenses is different than the owner of the right to receive future support from his natural father.

Doak v. Milbauer, 216 Neb. at 335, 343 N.W.2d at 753.

In *State on behalf of S.M. v. Oglesby*, 244 Neb. 880, 510 N.W.2d 53 (1994), an action brought more than 12 years after the birth of the child, this court, although denying relief for medical expenses incurred in relation to the pregnancy and confinement, upheld a judgment for future support. In doing so, we said:

> Section 43-1411 provides that *any* child, through a guardian or next friend, may assert rights to knowledge of paternity and to support for 18 years after the child's birth. Such a statute complies completely with the State's "parens patriae" role in protecting the rights of minors who are under a legal disability to sue on their own behalf. Any guardian or next friend, including the State, can bring such actions.

State on behalf of S.M. v. Oglesby, 244 Neb. at 883-84, 510 N.W.2d at 56.

A *next friend* is one who, in the absence of a guardian, acts for the benefit of an infant. *In re Beghtel's Estate*, 20 N.W.2d 421 (Iowa 1945). See, also, *Pullen v. Novak*, 169 Neb. 211, 99 N.W.2d 16 (1959) (infants have a right to sue by guardian or next friend to recover damages done to their person or property by others). The State may bring an action on behalf of a minor for future support. *State on behalf of S.M. v. Oglesby, supra.*

The judgment of the district court was correct and is affirmed.

AFFIRMED.

WRIGHT, J., participating on briefs.

WOODMEN OF THE WORLD LIFE INSURANCE SOCIETY, APPELLEE, V. C. FRANK KIGHT, ALSO KNOWN AS CLAYTON FRANK KIGHT, APPELLANT.

522 N.W.2d 155

Filed September 30, 1994. No. S-93-089.

1. **Courts.** Whether a suit should be entertained or dismissed under the rule of forum non conveniens depends largely upon the facts of the particular case and rests in the discretion of the trial court.
2. **Contracts: Compromise and Settlement.** A settlement agreement is subject to the general principles of contract law.
3. **Appeal and Error.** In a bench trial of an action at law, the factual findings by the trial court have the effect of a jury verdict and will not be set aside unless they are clearly wrong.
4. **Court Rules: Waiver.** The district court may exercise its inherent power to waive its own rules in appropriate circumstances where no injustice would result.

Appeal from the District Court for Douglas County: JERRY M. GITNICK and KEITH HOWARD, Retired, Judges. Affirmed.

James B. McVay, of Stern, Swanson, Sleder & McVay, for appellant.

Kirk S. Blecha and Carol C. Knoepfler, of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, for appellee.

HASTINGS, C.J., WHITE, FAHRNBRUCH, and LANPHIER, JJ., and BOSLAUGH, J., Retired.

BOSLAUGH, J., Retired.

This appeal arises from an action filed by the plaintiff, Woodmen of the World Life Insurance Society, for declaratory judgment on a contract between the plaintiff and the defendant, C. Frank Kight, also known as Clayton Frank Kight, an Alabama resident. The defendant filed a motion to dismiss pursuant to Neb. Rev. Stat. § 25-538 (Reissue 1989), which authorizes a court to stay or dismiss an action in whole or in part on any conditions that may be just when the court finds that in the interest of substantial justice the action should be heard in another forum. The trial court denied the defendant's motion, and on the date trial of the case was to begin, November 23, 1992, the parties agreed to settle their dispute. The defendant refused to sign the settlement agreement, and

the plaintiff filed, on December 11, 1992, a motion to confirm the settlement. Following a hearing on the motion to confirm the settlement, the trial court found that a settlement agreement had been entered into by the parties, the terms of which were reflected in the settlement documents that the defendant refused to sign. The trial court sustained the plaintiff's motion to confirm the settlement.

The defendant has appealed and assigns as error the trial court's failure to grant his motion to dismiss, the trial court's finding that a binding settlement agreement existed between the parties, and the trial court's failure to apply Fourth Jud. Dist. R. of Prac. 4 (Jan. 1988).

The plaintiff is a fraternal benefit society incorporated in the State of Nebraska and licensed to do business in all 50 states. Its national headquarters are located in Omaha, Nebraska.

The defendant worked as an independent contractor for the plaintiff in the capacity of field representative. As a field representative, the defendant was responsible for increasing membership in and advancing the interests of the plaintiff by soliciting applications from individuals in the south Alabama area for benefit certificates, including life insurance, and by working with individuals to maintain their benefit certificates.

On July 1, 1986, the plaintiff and the defendant executed a full-time field representative/Woodmen advantage contract. After the plaintiff's area and state managers and the defendant signed the contract in Alabama, the contract was forwarded to the plaintiff's offices in Omaha for review, approval, and final execution. The original contract was retained by the plaintiff in its Omaha office.

The contract contained a choice of law and choice of venue provision. Pursuant to paragraph 12 of the contract, the parties "agree that this contract is to be construed according to the laws of the State of Nebraska and that the exclusive venue for the pursuit of any legal proceeding or remedy arising out of this contract shall be in Douglas County, Nebraska."

During his relationship with the plaintiff, the defendant had numerous contacts with Omaha, Nebraska. All of the defendant's commission payments and accounting functions concerning those commissions originated in the plaintiff's

offices in Omaha. All Woodmen insurance products and benefit certificates the defendant sold were transmitted by the defendant either by mail or by computer transmission to the plaintiff's offices in Omaha, and when the insurance products and benefit certificates the defendant sold were issued by the plaintiff, they were issued from the plaintiff's offices in Omaha. If the defendant changed or adjusted a member's Woodmen certificate, the defendant reported those changes to the plaintiff's office in Omaha, where the adjustments would be made.

The defendant's direct contacts with Omaha also included special telephone access to a data communications line in Omaha which the defendant, as a Woodmen field representative, could use to obtain information concerning Woodmen members. The defendant also attended three different training sessions offered and conducted by the plaintiff at its Omaha offices in July 1979, April 1982, and April 1984. The plaintiff paid for the defendant's travel expenses to and from Omaha, as well as expenses incurred during the defendant's attendance at the seminars.

On October 25, 1990, the plaintiff terminated its relationship with the defendant because he gave confidential member information to a competing life insurance company's agent. The defendant subsequently brought an action against the plaintiff and others in the circuit court for Montgomery County, Alabama, on July 8, 1991, alleging violations of the contract. On August 2, the plaintiff filed its application for declaratory judgment and petition against the defendant in the district court for Douglas County, Nebraska, seeking, in part, a declaratory judgment that the defendant had breached his obligations under the contract by selling replacement insurance policies of another company to Woodmen members, thereby causing those members to terminate their Woodmen policies.

The defendant filed his motion to dismiss on September 27, 1991, seeking the dismissal of the plaintiff's action on the theory of forum non conveniens. After a hearing on the motion, the trial court denied the motion.

Trial in this action was scheduled to begin on November 23, 1992. The parties, including the defendant, appeared for trial.

Also present were witnesses that the plaintiff expected to call at trial who had traveled to Omaha from Alabama. Out-of-state counsel from Alabama for both sides, as well as local counsel, were present.

On the morning of the trial, the parties reached a settlement of all their differences. The defendant; his local counsel, William T. Ginsburg; and his Alabama counsel, D. Bruce Petway, personally negotiated settlement terms with the plaintiff's representatives. Later that day in the courtroom, counsel for the plaintiff, Kirk S. Blecha and Carol C. Knoepfler, and the defendant's counsel, Ginsburg and Petway, recited on the record the terms of the settlement agreement reached between the plaintiff and the defendant. The record of that proceeding shows the following:

> [MR. PETWAY:] Mr. Ginsburg and I would like to enter a statement that we have read this agreement in full and that Mr. Kight agreed to these provisions both last night and this morning and has given us the authority to settle both the cases referenced in this agreement and have them dismissed without prejudice by — with prejudice and that we are in agreement with the provisions as read in the statement [by Blecha and Knoepfler].
>
> MR. BLECHA: And also for — Continuing, I can represent that I was present this morning in the jury room when Mr. Kight verbally informed Mr. Petway and Mr. Ginsburg that they had authority to settle the case along the terms that we have read into the record.
>
> MR. PETWAY: And you would — you'd concur on that. He was present.
>
> MR. GINSBURG: I concur.

Because the defendant refused to sign the settlement documents, the plaintiff filed a motion to confirm the settlement, and a hearing on the motion was held on December 18, 1992.

At the hearing, the trial court received into evidence affidavits from the defendant's lawyers and the plaintiff's lawyer stating that the settlement documents accurately reflected the terms of the settlement agreement. The affidavits of the defendant's attorneys stated that the defendant had

agreed to such settlement terms. The trial court also received into evidence the transcript of the statement read into the record on November 23, 1992.

The defendant testified that he did not execute the written settlement documents because the documents did not contain all of the terms that he thought had been agreed upon by the parties.

In his first assignment of error, the defendant contends the trial court erred in denying his motion to dismiss.

Whether a suit should be entertained or dismissed under the rule of forum non conveniens depends largely upon the facts of the particular case and rests in the discretion of the trial court. *Qualley v. Chrysler Credit Corp.*, 191 Neb. 787, 217 N.W.2d 914 (1974).

In the present case, the trial court had personal jurisdiction over the defendant, and the record is replete with evidence of the defendant's connections with Nebraska such that he should have reasonably anticipated being haled into court in Douglas County on legal matters arising from the contract. All of the business produced by the defendant was transacted through the home office in Omaha. The contract at issue is in the home office, as are other records relating to this case. The defendant had been to Omaha on three occasions for training seminars. Finally, the contract provided that Douglas County, Nebraska, would be the exclusive venue for any legal action arising out of the contract and that the contract is governed by Nebraska law. There is no evidence that the defendant executed the contract under fraud or duress by the plaintiff.

The trial court did not abuse its discretion in denying the defendant's motion to dismiss.

Next, the defendant argues the trial court erred in finding a binding settlement agreement exists between the parties. According to the defendant, his attorneys did not have authority to settle the case on the terms presented to the trial court.

A settlement agreement is subject to the general principles of contract law. *Heese Produce Co. v. Lueders*, 233 Neb. 12, 443 N.W.2d 278 (1989). In a bench trial of an action at law, the factual findings by the trial court have the effect of a jury

verdict and will not be set aside unless they are clearly wrong. *Id.*

The trial court found and the record shows that the defendant's local counsel and out-of-state counsel testified that the defendant had given them authority to settle the case pursuant to the terms that were read into the record on November 23, 1992, and contained in the written settlement documents. Furthermore, the defendant testified that the day the settlement was reached, Ginsburg and Petway were acting on his behalf.

The defendant has failed to show that his attorneys were without authority to settle the case. See *Koch v. Koch*, 226 Neb. 305, 411 N.W.2d 319 (1987). Accordingly, the defendant's second assignment of error is without merit.

Finally, the defendant asserts that the trial court erred when it failed to apply Fourth Jud. Dist. R. of Prac. 4 (Jan. 1988), which provides that

> [a]ll stipulations not made in open court or in chambers and recorded by the reporter and all agreements of counsel or parties to a suit must be reduced to writing and signed by the parties making the same and filed with the clerk, or they will not be recognized or considered by the court.

During the hearing on the motion to confirm settlement, the trial judge stated he waived the rule 4 requirement to avoid injustice because of all the time spent by the parties and the court in negotiating the settlement and because the trial date, the attorneys, and the court's time had been relinquished. In its order confirming the settlement between the parties, the trial court specifically waived the requirements of rule 4 pursuant to Fourth Jud. Dist. R. of Prac. 25 (Jan. 1988). Rule 25 states, "Any of the foregoing rules shall be subject to such modification by the court as may be necessary in special instances to meet emergencies or to avoid injustice or great hardship."

In *Heese Produce Co. v. Lueders, supra*, this court held that the district court may exercise its inherent power to waive its own rules in appropriate circumstances where no injustice would result. In *Heese*, the trial court waived its rule requiring that settlement agreements be reduced to writing when it

confirmed a settlement of the parties, and this court concluded no injustice resulted from the trial court's waiver of its own rule.

In the present case, the terms of the settlement were read into the record on November 23, 1992, and the defendant's attorneys testified that he gave them authority to settle the case according to those terms. The settlement documents reflected the terms that were recited into the record. The district court did not abuse its discretion by waiving rule 4.

The judgment of the trial court is affirmed.

AFFIRMED.

WRIGHT, J., participating on briefs.
CAPORALE, J., not participating.

IN RE ESTATE OF DELPHINE C. WAGNER, DECEASED. LOIS ANN TANK, APPELLANT, V. CLARA MAE LANGE, APPELLEE.

522 N.W.2d 159

Filed September 30, 1994. No. S-93-262.

1. **Summary Judgment: Appeal and Error.** In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
2. **Summary Judgment.** Summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. **Judgments: Appeal and Error.** With regard to questions of law, an appellate court is obligated to reach a conclusion independent from the trial court's conclusion.
4. **Judgments: Res Judicata.** The doctrine of res judicata provides that a final judgment on the merits is conclusive upon the parties in any later litigation involving the same cause of action.
5. **Judgments: Collateral Estoppel.** Under collateral estoppel, when an issue of ultimate fact has been determined by a final judgment, that issue cannot again be litigated between the same parties in a future lawsuit.

6. **Collateral Estoppel.** There are four conditions that must exist for the doctrine of collateral estoppel to apply: (1) The identical issue was decided in a prior action, (2) there was a judgment on the merits which was final, (3) the party against whom the rule is applied was a party or in privity with a party to the prior action, and (4) there was an opportunity to fully and fairly litigate the issue in the prior action.
7. **Wills: Words and Phrases.** One possesses testamentary capacity if she understands the nature of her act in making a will or a codicil thereto, knows the extent and character of her property, knows and understands the proposed disposition of her property, and knows the natural objects of her bounty.
8. **Contracts: Undue Influence: Proof.** The setting aside of a contract for undue influence requires clear and convincing evidence.
9. **Wills: Undue Influence: Proof.** In a will contest, undue influence need only be established by a preponderance of the evidence.
10. **Summary Judgment: Proof.** A party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must furnish sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law if the evidence presented remains uncontroverted. After the moving party has shown facts entitling it to judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents a judgment as a matter of law for the moving party.
11. **Wills: Proof.** The burden is on the proponent of a will to prove the testamentary capacity of the testator.
12. _____: _____. A self-proved will establishes prima facie proof of testamentary capacity.
13. **Wills: Witnesses.** A nonexpert witness who is shown to have had a more or less intimate acquaintance with a person may be permitted to state an opinion as to the mental condition of that person by giving the facts and circumstances upon which the opinion is based. However, it must appear that the witness has in mind the quality of mental capacity essential to the making of a valid will and that the facts and circumstances attested to are sufficient upon which to base an opinion.
14. **Undue Influence: Proof.** Mere suspicion, surmise, or conjecture does not warrant a finding of undue influence; there must be a solid foundation of established facts on which to rest the inference of its existence.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Affirmed.

Neil W. Schilke, of Sidner, Svoboda, Schilke, Thomsen, Holtorf & Boggy, for appellant.

William G. Line, of Kerrigan & Line, and Darrell K. Stock, of Snyder & Stock, for appellee.

HASTINGS, C.J., WHITE, CAPORALE, FAHRNBRUCH, and LANPHIER, JJ., and BOSLAUGH, J., Retired.

LANPHIER, J.

This case concerns a will contest between children of the decedent, Delphine C. Wagner. A daughter of the decedent, Clarinda Foote, submitted a will dated April 2, 1984, for probate in the county court for Dodge County. The will specified it made no provision for four children who unsuccessfully had attempted to put the decedent under a conservatorship to set aside leases on ground formerly rented to some of them. It left all property to the two remaining children. The appellant, Lois Ann Tank, objected to probate of the will on the grounds that the testator lacked the capacity to make a will and that the will was the product of undue influence. After a hearing on the matter, the trial court awarded summary judgment to the appellee, Clara Mae Lange. The appellant, asserting that there were genuine issues of material fact raised, appealed from that order to the Nebraska Court of Appeals. Subsequently, we removed this case to the Supreme Court docket in order to regulate the caseloads of the appellate courts. Our review of the record establishes that the district court correctly concluded that there were no genuine issues of material fact. We therefore affirm.

BACKGROUND

Delphine Wagner and her husband Roy had six children, Clara Mae Lange, Clarinda Foote, Lyman Wagner, Lois Ann Tank, Genevieve Beerbohm, and Del Nor Sazama. After Roy Wagner died, four of the children, Lyman Wagner, Lois Ann Tank, Genevieve Beerbohm, and Del Nor Sazama, initiated proceedings to have a conservator appointed for their mother and to have a lease she made set aside. See *In re Estate of Wagner*, 220 Neb. 32, 367 N.W.2d 736 (1985) (*Wagner I*). Delphine Wagner leased a certain parcel of land to Scribner Alfalfa, Inc. Charles Lange, Clara Mae's husband, worked at Scribner Alfalfa, Inc. In previous years the land had been rented to Lyman Wagner and to Lois Ann Tank and her husband Paul, who wished to continue renting the land.

The county court for Dodge County appointed a conservator and set aside the lease. See *Wagner I*. After reviewing the case, the district court vacated the appointment and reinstated the

lease. This court in *Wagner I* affirmed the judgment of the district court.

Delphine Wagner died July 22, 1992. On July 26, Clarinda Foote filed in the county court for Dodge County a petition for probate of the will dated April 2, 1984. That will in pertinent part stated:

> FIRST: I specifically make no provision for my children, Lyman Wagner, Lois Ann Tank, Genevieve Beerbohm and Del Nor Sazama for the reason that they have joined in a petition to place me under conservatorship to set aside leases I made with the Scribner Alfalfa Mill on ground formerly rented to Lyman Wagner and Paul and Lois Ann Tank. Despite the fact that doctors said that I was mentally sound, they have carried on a court fight putting me to heavy and needless expense and I direct that they take no part of any of my property, real or personal.
>
> SECOND: I give all of my property, both real and personal, to my two remaining children, Clarinda Foote and Clara Mae Lange.

On August 21, 1992, Lois Ann Tank filed objections to the petition for probate. She contended that Delphine Wagner lacked testamentary capacity to make the will and that the will was the product of undue influence. Lois Ann Tank then transferred the matter to the district court for Dodge County. Clara Mae Lange moved for summary judgment in the district court, asserting that the evidence submitted failed to raise a genuine issue of material fact and that she was entitled to judgment as a matter of law. Relying on *Wagner I*, Clara Mae Lange contended that this matter is res judicata. The district court sustained the motion, but did not state the basis of its decision to do so.

ASSIGNMENTS OF ERROR

Lois Ann Tank asserts that the district court erred in granting summary judgment. She contends that there were genuine issues of material fact with respect to whether the testator had testamentary capacity and whether the will was the product of undue influence.

STANDARD OF REVIEW

In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Zwingman v. Kallhoff*, 244 Neb. 514, 507 N.W.2d 894 (1993); *Murphy v. Spelts-Schultz Lumber Co.*, 240 Neb. 275, 481 N.W.2d 422 (1992); *Spittler v. Nicola*, 239 Neb. 972, 479 N.W.2d 803 (1992). Moreover, summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Zwingman v. Kallhoff, supra*; *Murphy v. Spelts-Schultz Lumber Co., supra*; *Moore v. Hartford Fire Ins. Co.*, 240 Neb. 195, 481 N.W.2d 196 (1992); *Barelmann v. Fox*, 239 Neb. 771, 478 N.W.2d 548 (1992).

SUMMARY JUDGMENT

The question presented for review in this case is whether the trial court erred in determining that there were no genuine issues of material fact regarding Delphine Wagner's testamentary capacity or whether she was subject to undue influence when she made her will.

An underlying issue raised by the appellee is whether the doctrines of res judicata or collateral estoppel would bar the appellant from contesting the will on grounds of undue influence and lack of testamentary capacity. If the doctrines of res judicata or collateral estoppel legally preclude the appellant from contesting Delphine Wagner's testamentary capacity or whether she was subject to undue influence, there could be no genuine issue as to those facts. See *Kopecky v. National Farms, Inc.*, 244 Neb. 846, 510 N.W.2d 41 (1994). Thus, if either of the doctrines apply, it follows that the grant of summary judgment was appropriate. However, if the doctrines do not apply, that does not mean that the grant of summary judgment was necessarily erroneous. In such a case, we must review the evidence to determine if a genuine issue of material fact is raised.

COLLATERAL ESTOPPEL/RES JUDICATA

The applicability of the doctrines of collateral estoppel and res judicata to this case constitutes a question of law. See *Kopecky v. National Farms, Inc., supra*. With regard to questions of law, an appellate court is obligated to reach a conclusion independent from the trial court's conclusion. *Id.*; *Petska v. Olson Gravel, Inc.*, 243 Neb. 568, 500 N.W.2d 828 (1993).

Although the appellee uses the term res judicata, her arguments raise the point that the same issues addressed in *Wagner I*, mental capacity and undue influence, are being raised in the instant action. The doctrine of res judicata provides that a final judgment on the merits is conclusive upon the parties in any later litigation involving the same cause of action. *Petska v. Olson Gravel, Inc., supra*. Under collateral estoppel, when an issue of ultimate fact has been determined by a final judgment, that issue cannot again be litigated between the same parties in a future lawsuit. *Id.* Given the substance of the appellee's argument, and the fact that a will contest and a conservatorship proceeding are not the same causes of action, we believe the issue the appellee raises concerns the doctrine of collateral estoppel and not res judicata.

There are four conditions that must exist for the doctrine of collateral estoppel to apply: (1) The identical issue was decided in a prior action, (2) there was a judgment on the merits which was final, (3) the party against whom the rule is applied was a party or in privity with a party to the prior action, and (4) there was an opportunity to fully and fairly litigate the issue in the prior action. *Kopecky v. National Farms, Inc., supra*; *McCook Nat. Bank v. Myers*, 243 Neb. 853, 503 N.W.2d 200 (1993); *State on behalf of J.R. v. Mendoza*, 240 Neb. 149, 481 N.W.2d 165 (1992).

In determining the applicability of collateral estoppel to this case, we necessarily will be required to decide whether the issues decided in *Wagner I* are identical to those raised here.

In *Wagner I*, 220 Neb. at 33, 367 N.W.2d at 738, the issues decided were "whether the requirements of [Neb. Rev. Stat.] § 30-2630 [(Cum. Supp. 1984)] were met so as to justify the appointment of a conservator for Mrs. Wagner" and whether a

lease she made should be set aside as the product of undue influence. We will address each of these issues separately.

First, we will address the appointment of a conservator. The appellee's argument, in essence, is that the determination of mental capacity for the purposes of a conservatorship proceeding is sufficient to determine the existence of testamentary capacity. However, a comparison of the elements of each clearly shows that mental capacity for the purposes of a conservatorship and testamentary capacity are not the same. See, also, *In re Estate of Camin*, 212 Neb. 490, 323 N.W.2d 827 (1982) ("mental competence" is not the same as "testamentary capacity"). The requirements for the appointment of conservator, as set forth in Neb. Rev. Stat. § 30-2630(2) (Reissue 1989), are that

> (i) the person is unable to manage his or her property and property affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, confinement, or lack of discretion in managing benefits received from public funds, detention by a foreign power, or disappearance; and (ii) the person has property which will be wasted or dissipated unless proper management is provided . . . .

One possesses testamentary capacity if she understands the nature of her act in making a will or a codicil thereto, knows the extent and character of her property, knows and understands the proposed disposition of her property, and knows the natural objects of her bounty. *In re Estate of Peterson*, 232 Neb. 105, 439 N.W.2d 516 (1989).

Since the requisite elements for the appointment of a conservator are different than the elements of testamentary capacity, the issues decided in *Wagner I* are necessarily different than those raised in the instant case. Therefore, the doctrine of collateral estoppel does not apply to bar the appellant from contesting Delphine Wagner's will for lack of testamentary capacity.

We also find that the doctrine of collateral estoppel does not apply to prevent the appellant from contesting the will on grounds of undue influence. Again, the issue addressed in

Wagner I is different from the one raised here. In *Wagner I*, the alleged undue influence concerned a lease. Here it concerns a will. A finding that there was no undue influence with respect to a lease made at one time has nothing to do with whether there was undue influence with respect to a will made at another time. In *Gutzmer v. Nelsen*, 121 Neb. 214, 236 N.W. 614 (1931), this court held that a finding of undue influence used to set aside a will did not conclusively establish by means of the doctrine of res judicata that a deed subsequently made was the product of undue influence. There we stated:

> Though the parties in the two cases are identical, there is no identity in the things sued for or in the causes of action in the will case and in this case to set aside the deed. Res judicata does not exist where there is no identity in the thing sued for or in the cause of action.

(Emphasis omitted.) *Id.* at 217, 236 N.W. at 615.

In any event, the standards of proof in the two proceedings are different. The setting aside of a contract for undue influence requires clear and convincing evidence. *Miller v. Westwood*, 238 Neb. 896, 472 N.W.2d 903 (1991). However, in a will contest, undue influence need only be established by a preponderance of the evidence. *In re Estate of Price*, 223 Neb. 12, 388 N.W.2d 72 (1986). Just because the evidence offered in the prior action was not clear and convincing does not mean that the same evidence could not constitute a preponderance of the evidence. See Restatement (Second) of Judgments § 28(4), comment *f.*, illus. 11 (1982). Thus, the doctrine of collateral estoppel again could not serve to conclusively establish that the will was not a product of undue influence.

Review of the Evidence Presented

Next, we turn to whether, given the evidence presented with respect to the testamentary capacity of Delphine Wagner, summary judgment was appropriate.

A party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must furnish sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law if the evidence presented remains uncontroverted. After the moving party has

shown facts entitling it to judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents a judgment as a matter of law for the moving party. *Ev. Luth. Soc. v. Buffalo Cty. Bd. of Equal.*, 243 Neb. 351, 500 N.W.2d 520 (1993); *Howard v. Blue Cross Blue Shield*, 242 Neb. 150, 494 N.W.2d 99 (1993).

The burden is on the proponent of a will to prove the testamentary capacity of the testator. *In re Estate of Camin*, 212 Neb. 490, 323 N.W.2d 827 (1982). However, a self-proved will establishes prima facie proof of testamentary capacity. *Id.* It is undisputed that the will in question is a self-proved will; therefore, the appellee, the proponent of the will, has established prima facie proof of testamentary capacity and met her burden with respect to the motion for summary judgment.

Next, we must consider whether the appellant met her burden to present evidence showing a genuine issue of material fact to prevent judgment as a matter of law. In her brief, the appellant contends that the strongest evidence of Delphine Wagner's lack of testamentary capacity is a handwritten document dated March 26, 1984. In this note, Delphine Wagner expresses thoughts on her will, anger toward those of her children who initiated the conservatorship proceedings, and despair. The appellant suggests that because not all of the property Delphine Wagner owned was specifically mentioned in the note, Delphine Wagner did not know the extent of her property. The appellant's argument presumes that Delphine Wagner's intent in drafting the note was to inventory her property. That she did not mention all of her property in this note is of so little consequence that it cannot even be considered relevant evidence as to whether she knew the extent of her property.

The appellant also suggests that the phrase "Paul [Tank] has no 1/6 in this place whatsoever," found in the above-mentioned note, tends to prove Delphine Wagner's lack of testamentary capacity by establishing that she did not know the natural objects of her bounty. In her brief, the appellant states: "The reference to his [Paul Tank's] one-sixth interest, if equated with the interest of his wife Lois Ann, would indicate a belief or intent by Delphine that the property was passing equally to her

six children or the five other than Lois Ann." Brief for appellant at 45.

The appellant's strained attempt to find meaning in this statement by means of successive inferences clearly illustrates that rather than evidence, the appellant is relying upon conjecture.

The appellant argues that Delphine Wagner obviously lost testamentary capacity at some point before she died. The appellant further argues that Delphine Wagner suffered a stroke on May 8, 1984, a little more than a month after she executed her will. Since the condition causing the stroke was obviously progressive in nature, the appellant argues that there is a sufficient basis to raise a genuine issue of material fact as to Delphine Wagner's testamentary capacity on the date she executed her will. We disagree. Even if we assume that Delphine Wagner lost testamentary capacity at some point before she died, a fact we need not decide, the evidence presented fails to raise a genuine issue of material fact with respect to her testamentary capacity on April 2, 1984. The appellant is asking us to infer from the fact that Delphine Wagner suffered a stroke on May 8, 1984, that her capacity was diminished more than a month earlier. However, to make such inferences regarding the effects of the stroke on Delphine Wagner's testamentary capacity a month earlier would require us to ignore clear facts. The record affirmatively shows that Delphine Wagner's mental capacity was unaffected 1 month *after* the stroke. Dr. Roger W. Dilley, Delphine Wagner's physician, testified during a deposition that notes he made in conjunction with a June 8, 1984, visit from Delphine Wagner reflected that "she had no evidence of any confusion or difficulty making decisions."

With respect to the medical evidence adduced, the appellant admits in her brief that "medical records, including the doctor's notes, show nothing regarding substantial mental difficulty until May 30, 1988." Brief for appellant at 40. This is more than 4 years after the will was executed. Although this seems to support the grant of summary judgment, the appellant's point is that the absence of medical records should not be considered evidence in support of testamentary capacity. However, we are not concerned with the weight of the evidence, but, rather, with

whether the appellant has adduced evidence to establish a genuine issue of material fact. She has not.

Lastly, the appellant offers her opinions and those of her siblings on Delphine Wagner's testamentary capacity. It is true that a nonexpert witness who is shown to have had a more or less intimate acquaintance with a person may be permitted to state an opinion as to the mental condition of that person by giving the facts and circumstances upon which the opinion is based. *In re Estate of Thompson*, 225 Neb. 643, 407 N.W.2d 738 (1987). However, it must appear that the witness has in mind the quality of mental capacity essential to the making of a valid will and that the facts and circumstances attested to are sufficient upon which to base an opinion. *In re Estate of Camin, supra.* Without detailing all the deposition testimony offered by the disinherited children, it is clear that they did not have in mind the requirements for testamentary capacity at the time they offered their opinions. They also were unable to point to specific facts or circumstances upon which they based their testimony. A review of the remaining evidence contained in the record also fails to establish any genuine issue of material fact concerning Delphine Wagner's testamentary capacity. We, therefore, conclude as did the district court that the appellant failed to offer evidence which would present a genuine issue of material fact such as would prevent the rendering of judgment as a matter of law.

Finally, we must review the evidence with respect to the claim of undue influence. Undue influence such as to defeat a will is such manipulation as destroys the free agency of the testator and substitutes another's purpose for that of the testator. *In re Estate of Peterson*, 232 Neb. 105, 439 N.W.2d 516 (1989). Mere suspicion, surmise, or conjecture does not warrant a finding of undue influence; there must be a solid foundation of established facts on which to rest the inference of its existence. *Wagner I.*

It is well established that both the appellee and Clarinda Foote were intimately involved in virtually all aspects of their mother's life during her declining years. That they possessed the opportunity to exercise undue influence cannot be seriously disputed. However, there is virtually no evidence of the other

elements of undue influence.

With respect to whether Delphine Wagner was subject to undue influence, the record clearly demonstrates that she was not. The record shows that despite the strenuous efforts of certain of her children and her son-in-law Paul Tank to control her, she was determined to retain control over her own affairs. She appeared to be of a mind clearly not amenable to undue influence.

Likewise, the appellant fails to present a genuine issue of fact concerning whether the appellee or Clarinda Foote was disposed to exercise undue influence for an improper purpose. The record shows that they were thoroughly involved in the feud which obviously caused Delphine Wagner great anguish. However, it does not show their disposition to exercise undue influence. Though replete with allegations, the record is devoid of any underlying factual basis for those allegations.

With respect to the appellant's claim that Delphine Wagner's will was the product of undue influence, we conclude that the district court's grant of summary judgment was appropriate.

CONCLUSION

Because there is no genuine issue of material fact which would prevent the rendering of judgment as a matter of law, we affirm the judgment of the district court.

AFFIRMED.

WHITE, J., not participating in the decision.

WRIGHT, J., not participating.

FIRST NATIONAL BANK IN MORRILL, A NATIONAL ASSOCIATION, APPELLEE, V. UNION INSURANCE COMPANY, APPELLANT.

522 N.W.2d 168

Filed September 30, 1994. No. S-93-343.

1. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.

2. **Summary Judgment.** Summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. **Motions for Summary Judgment: Affidavits.** Affidavits supporting and opposing motions for summary judgment shall be made on personal knowledge.
4. **Appeal and Error.** An appellate court may elect to consider plain error not assigned.
5. _____. Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.
6. **Demurrer: Pleadings.** When considering a demurrer to a petition, a court must assume the pleaded facts, as opposed to legal conclusions, are true as alleged and must give the petition the benefit of any reasonable inference arising from the facts alleged; however, a court cannot assume the existence of a fact not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial.
7. **Motor Vehicles: Bonds: Liens: Liability.** The amount which an aggrieved lienholder may recover on a motor vehicle dealer's bond is the balance remaining on the secured loan, not to exceed the statutory limit of the bond.
8. **Attorney Fees.** Attorney fees and expenses may be recovered only where provided for by statute, or where the uniform course of procedure has been to allow such a recovery.
9. **Attorney Fees: Words and Phrases.** "Frivolous," for the purposes of Neb. Rev. Stat. § 25-824 (Reissue 1989), is defined as being a legal position wholly without merit, that is, without rational argument based on law and evidence to support a litigant's position in the lawsuit.

Appeal from the District Court for Scotts Bluff County, ALFRED J. KORTUM, Judge, on appeal thereto from the County Court for Scotts Bluff County, JAMES L. MACKEN, Judge. Judgment of District Court reversed, and cause remanded with directions.

Robert G. Simmons, Jr., of Simmons, Olsen, Ediger & Selzer, P.C., for appellant.

Richard A. Douglas, of Nichols, Douglas, Kelly, and Meade, P.C., for appellee.

HASTINGS, C.J., WHITE, CAPORALE, FAHRNBRUCH, and LANPHIER, JJ., and BOSLAUGH, J., Retired.

FAHRNBRUCH, J.

The defendant, Union Insurance Company (Union), appeals

a district court order holding Union liable on a statutorily required motor vehicle dealer's bond which it had issued to Kizzier Chevrolet Company of Scottsbluff (Kizzier).

The Scotts Bluff County Court entered summary judgment in favor of the plaintiff, First National Bank in Morrill (FNB), and the district court affirmed.

Having found plain error, we reverse the judgment of the district court for Scotts Bluff County and remand the cause for further proceedings consistent with this opinion.

STANDARD OF REVIEW

In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *LaBenz Trucking v. Snyder, ante* p. 468, 519 N.W.2d 259 (1994); *Barta v. Kindschuh, ante* p. 208, 518 N.W.2d 98 (1994). Summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Id.*

In this case, our review will be limited solely to the pleadings because FNB offered into evidence only two affidavits in support of its motion for summary judgment. Both of the affidavits were executed by Gary G. Steele, first vice president of FNB. It was error for the county court to base its decision on those affidavits because there was no showing that the affidavits were made upon Steele's personal knowledge of the facts set forth therein. See Neb. Rev. Stat. § 25-1334 (Reissue 1989) (requiring that affidavits supporting and opposing motions for summary judgment must be made on personal knowledge). We, therefore, decline to consider the affidavits.

FACTS

Based on the pleadings of the parties and the appendages thereto, the facts of this case are as follows:

On July 6, 1988, Clark and Connie Morrill, husband and wife, gave a promissory note in the amount of $7,200 to FNB. That note provided for the Morrills to make 36 monthly

payments of $241.62, beginning August 15, 1988, for a total indebtedness of $8,698.32. FNB took a security interest in the Morrills' 1985 Ford pickup and perfected its security interest as a first lien on the vehicle's certificate of title.

On January 19, 1991, the Morrills entered into a purchase contract with Kizzier for a 1988 pickup and traded in their 1985 pickup. Kizzier gave the Morrills a trade allowance of $2,350 for the 1985 pickup, minus the outstanding balance on the FNB note. The purchase contract between Kizzier and the Morrills shows the "balance owed on trade" as $1,880. Kizzier claims that FNB had advised Kizzier that the lien could be released for $1,880. Kizzier remitted a check for that amount to FNB on January 21 and requested that the title to the 1985 pickup and release of the lien be sent to Kizzier.

Kizzier delivered the 1988 pickup to the Morrills, and the Morrills delivered the 1985 pickup to Kizzier. Kizzier began making repairs on the 1985 pickup. The pleadings reflect various values for those repairs, including "several hundred dollars" and "approximately $2,000."

Subsequently, FNB returned the $1,880 check to Kizzier with a letter dated February 4, which letter stated in part: "Please find enclosed a check to payoff [sic] Clark Morrill's pickup loan with us. We are returning it to you as we will not accept this as payment in full." FNB did not state the amount it *would* accept as payment in full and refused to provide Kizzier with the title to the 1985 pickup.

Kizzier, being unable to obtain title to the 1985 pickup, refused to provide the Morrills with the title to the 1988 pickup. The Morrills at some point returned the 1988 pickup to Kizzier because they could not license the vehicle without the title. However, Kizzier refused to return the 1985 pickup to the Morrills because it had not been reimbursed for the cost of repairs it had made to the 1985 pickup.

On May 13, 1991, FNB filed a lawsuit in the Scotts Bluff County Court against Union, an insurance/bonding company which had issued a motor vehicle dealer's bond to Kizzier pursuant to Neb. Rev. Stat. § 60-1419 (Reissue 1993). FNB sought indemnification as a lienholder, alleging that Kizzier had refused a demand that Kizzier release the 1985 pickup to FNB,

and that FNB had been damaged by the value of the pickup, i.e., $4,000, plus its expenses in attempting to "obtain possession" of the pickup from Kizzier.

On June 17, the Morrills filed bankruptcy proceedings in the U.S. Bankruptcy Court for the District of Nebraska. On July 24, the county court stayed the proceedings in its court pending resolution of the bankruptcy case.

After filing their bankruptcy proceedings, the Morrills claimed the 1985 pickup as an asset of the bankruptcy estate and demanded that Kizzier turn over the 1985 pickup to them or to the trustee. Kizzier resisted the application for a turnover order and claimed ownership of the vehicle. The bankruptcy court found the Morrills to be the owners of the 1985 pickup and ordered Kizzier "to turn over to the [Morrills] the 1985 vehicle *immediately upon receipt of the amount Kizzier claims to have expended for repair for that vehicle.*" (Emphasis supplied.) The record is silent as to any adjudication by the bankruptcy court of the Morrills' rights vis-a-vis FNB, nor is there any indication that Union was a party to the bankruptcy proceedings.

The stay was lifted and the bankruptcy closed on May 19, 1992. On May 29, FNB filed an amended petition in the Scotts Bluff County Court, and the case proceeded.

On June 10, Union demurred to the amended petition, claiming, inter alia, that FNB's petition did not state facts sufficient to constitute a cause of action. Union's demurrer was overruled on September 24. Union moved for summary judgment on September 25 and filed an answer to the amended petition on September 28.

On October 5, FNB filed a motion for summary judgment. At a hearing on the summary judgment motions of both parties, FNB entered two affidavits into evidence. Union joined in offering a memorandum opinion of the bankruptcy court which was attached to one of the affidavits offered by FNB, and offered no other controverting evidence. On December 18, the county court sustained FNB's summary judgment motion and overruled Union's. The court awarded FNB $5,755.89 plus costs of the action.

Union timely appealed to the district court. That court

affirmed the judgment of the county court in all respects. Union then appealed to the Nebraska Court of Appeals. The case was removed from the Court of Appeals to this court pursuant to our authority to regulate the caseloads of the appellate courts of this state.

ASSIGNMENTS OF ERROR

Union has made numerous assignments of error. However, an appellate court may elect to consider plain error not assigned. See, Neb. Rev. Stat. § 25-1919 (Cum. Supp. 1992); *Lindsay Ins. Agency v. Mead*, 244 Neb. 645, 508 N.W.2d 820 (1993). Plain error is error plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process. *Dike v. Dike*, 245 Neb. 231, 512 N.W.2d 363 (1994); *Hoch v. Prokop*, 244 Neb. 443, 507 N.W.2d 626 (1993).

Because we determine that the trial court committed plain error requiring that this cause be remanded for further proceedings, it is not necessary for us to consider Union's formal assignments of error.

ANALYSIS

We find that the trial court committed plain error in three respects: (1) its failure to sustain Union's demurrer to FNB's amended petition, (2) its entry of summary judgment in favor of FNB, and (3) its award to FNB based upon an incorrect measure of damages.

DEMURRER

When considering a demurrer to a petition, a court must assume the pleaded facts, as opposed to legal conclusions, are true as alleged and must give the petition the benefit of any reasonable inference arising from the facts alleged; however, a court cannot assume the existence of a fact not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial. *Schendt v. Dewey, ante* p. 573, 520 N.W.2d 541 (1994).

Because FNB has sued Union pursuant to § 60-1419, it is necessary to examine the provisions of that statute to determine the facts which FNB was required to plead in order to state a

cause of action.

Section 60-1419 requires a motor vehicle dealer to provide a corporate surety bond in the amount of $25,000 at the time of making application for licensure. Section 60-1419 also enumerates six specific situations in which a lienholder may recover on the surety bond, two of which FNB has relied upon in its lawsuit:

> The bond shall provide: . . . (2) that the licensed dealer will first fully indemnify any holder of a lien or security interest created pursuant to section 60-110 or article 9, Uniform Commercial Code, whichever applies, in the order of its priority . . . by reason of *any loss suffered* because of . . . (e) *any false and fraudulent representations* or deceitful practices whatever in representing any motor vehicle or trailer, and (f) the *dealer's failure to remit the proceeds* from the sale of any motor vehicle which is subject to a lien or security interest to the holder of such lien or security interest . . . .

(Emphasis supplied.)

For FNB to recover from Union on Kizzier's corporate surety bond pursuant to the above-cited subsections of § 60-1419, FNB must plead and prove that (1) FNB is the holder of a lien or security interest in the 1985 pickup created pursuant to Neb. Rev. Stat. § 60-110 (Reissue 1988) or article 9, Uniform Commercial Code; (2) FNB has suffered a loss; and (3) FNB's loss was because of either (a) Kizzier's false and fraudulent representations or deceitful practices in representing the 1985 pickup or (b) Kizzier's failure to remit to FNB the proceeds from the sale of the 1985 pickup.

In its amended petition, FNB alleged, inter alia, that it had a perfected first lien on the 1985 pickup; that Dwayne Kizzier had represented in an affidavit in the bankruptcy court that Kizzier was the owner of the 1985 pickup; that such representation was a false representation as set forth in § 60-1419(2)(e), was an act of conversion, and was a failure to remit proceeds in violation of § 60-1419(2)(f); and that as a result of Kizzier's failure to "return possession of the vehicle to the first lienholder" and Kizzier's "converting said vehicle," FNB was damaged in the amount of the value of the vehicle, i.e., $4,000.

A review of the pleadings reveals that the facts as pled by FNB are not sufficient to state a cause of action pursuant to § 60-1419. We are required to assume, as alleged in FNB's petition, that Dwayne Kizzier's statement in his affidavit in the bankruptcy court that Kizzier was the owner of the 1985 pickup constituted a false representation for the purposes of § 60-1419(2)(e). However, a false representation, standing alone, is insufficient to justify recovery by a lienholder under § 60-1419. The lienholder must also show that its loss is *proximately caused by* the false representation.

It is unascertainable from FNB's amended petition exactly how any "false representation" by Dwayne Kizzier in the bankruptcy court caused FNB to suffer a loss. In fact, we cannot discern how FNB would have been in any better position had Dwayne Kizzier *admitted* in the bankruptcy court that the Morrills owned the vehicle, in view of the bankruptcy court's finding that the Morrills owned the vehicle in any event. In the absence of a pleading by FNB that Kizzier's allegedly false representation in the bankruptcy court was the proximate cause of a loss to FNB on its lien, FNB has failed to state a cause of action under the provisions of § 60-1419(2)(e).

Furthermore, FNB has failed to state a cause of action under § 60-1419(2)(f) for failure of Kizzier to remit to FNB the proceeds of a "sale" of the 1985 pickup, because FNB has failed to plead the existence of any proceeds.

FNB also alleged that Kizzier's actions constitute a conversion of the vehicle. To the extent that this allegation differs from FNB's allegation that Dwayne Kizzier falsely represented Kizzier's ownership of the pickup, § 60-1419(2) provides no further relief to a lienholder for a conversion of a vehicle, and FNB therefore has no cause of action based upon conversion.

Because FNB has failed to plead facts to bring itself within the provisions of the motor vehicle dealer's bond statute, it has failed to state a cause of action, and it was plain error for the county court to overrule Union's demurrer to FNB's amended petition. Upon remand, FNB must be given an opportunity to file an amended petition in the county court if it so desires.

Our finding of plain error in the trial court's overruling of

Union's demurrer is dispositive of this appeal. However, because we are remanding the cause for further proceedings, we elect to address other plain error committed by the county court.

SUMMARY JUDGMENT

Next, we find that even if FNB's amended petition had been able to withstand Union's demurrer, FNB was not entitled to summary judgment. Our review of the pleadings shows that there are genuine issues of material fact which make summary judgment inappropriate in this case.

FNB alleged in its amended petition that Kizzier was in violation of its bond, while Union affirmatively alleged in its answer that Kizzier had complied with all of the requirements of the bond as described in § 60-1419, and specifically denied that Kizzier had made any false representations as to any motor vehicle. FNB also alleged that it was damaged in the amount of $4,000, the value of the 1985 pickup, all of which Union generally denied.

Whether Kizzier complied with the provisions of the bond and whether FNB was damaged and in what amount are all genuine issues of material fact which are raised by the pleadings, and which are sufficient to preclude summary judgment in favor of FNB.

MEASURE OF DAMAGES

Finally, we find that even if it had been proper to order summary judgment in favor of FNB, which we hold it was not, the pleadings reflect no basis in law for the county court to award the amount of damages granted to FNB. The journal entry of the county court sustaining FNB's motion for summary judgment simply awarded FNB $5,755.89 plus the costs of the action. This amount apparently represents an award of $4,000 for the value of the vehicle plus an award of $1,755.89 for attorney fees, and is so treated by both parties in their briefs.

The amount which an aggrieved lienholder may recover on a motor vehicle dealer's bond is the balance remaining on the secured loan, not to exceed the statutory limit of the bond. See, § 60-1419; *Havelock Bank v. Western Surety Co.*, 217 Neb.

560, 352 N.W.2d 855 (1984); *Sun Ins. Co. v. Aetna Ins. Co.*, 169 Neb. 94, 98 N.W.2d 692 (1959). FNB merely alleges in its amended petition that it had been damaged "by the value of the vehicle, to-wit, $4,000.00."

The value of the vehicle is not relevant to the correct measure of FNB's damages. Only *the remaining balance on the Morrills' promissory note which was secured by the 1985 pickup* is relevant in determining FNB's alleged damages. Because FNB has failed to plead or prove the remaining balance on the Morrill's July 6, 1988, promissory note secured by the 1985 pickup, it has failed to either plead or prove the value of its lien. Therefore, there exists no legal basis for an award of damages to FNB in any amount by way of summary judgment. It was plain error for the trial court to award FNB damages based upon the value of the vehicle and to award attorney fees to FNB.

ATTORNEY FEES

Both FNB and Union have moved this court for attorney fees. The rule in this state is that attorney fees and expenses may be recovered only where provided for by statute, or where the uniform course of procedure has been to allow such a recovery. *Henry v. Rockey, ante* p. 398, 518 N.W.2d 658 (1994). FNB requests attorney fees pursuant to Neb. Rev. Stat. § 44-359 (Reissue 1993), which provides for an award of fees in actions upon insurance policies. However, at this time, as a nonprevailing party, FNB is not entitled to attorney fees, and its motion is overruled. See, § 44-359; Neb. Rev. Stat. § 25-1708 (Reissue 1989).

Union has moved for attorney fees pursuant to Neb. Rev. Stat. § 25-824 (Reissue 1989) on the basis that the proceeding undertaken by FNB is frivolous. We have previously stated that "frivolous," for the purposes of § 25-824, is defined as being a legal position wholly without merit, that is, without rational argument based on law and evidence to support a litigant's position in the lawsuit. *Nebraska Pub. Emp. v. City of Omaha*, 244 Neb. 328, 506 N.W.2d 686 (1993); *Sports Courts of Omaha v. Meginnis*, 242 Neb. 768, 497 N.W.2d 38 (1993).

Because a lienholder is entitled to recover upon a motor

vehicle dealer's bond in certain situations, FNB's legal position is not "wholly without merit." There is, therefore, no basis at this time for an award of attorney fees pursuant to § 25-824, and Union's motion is overruled.

CONCLUSION

Having found plain error in the county court proceedings, we reverse the summary judgment in favor of FNB and remand the cause to the district court for Scotts Bluff County with direction to remand the cause to the county court with direction to vacate its summary judgment, to sustain Union's demurrer to FNB's amended petition, and to conduct further proceedings consistent with this opinion. The motions of both parties for attorney fees are overruled.

REVERSED AND REMANDED WITH DIRECTIONS.

WRIGHT, J., participating on briefs.

CON M. BRADLEY, APPELLANT, V. FRANK X. HOPKINS, APPELLEE.

522 N.W.2d 394

Filed September 30, 1994. No. S-93-378.

1. **Indictments and Informations: Complaints: Speedy Trial: Prisoners.** Neb. Rev. Stat. §§ 29-3801 through 29-3809 (Reissue 1989) provide a mechanism for the disposition of untried indictments, informations, and complaints pending in this state against a person already in the custody of the state Department of Correctional Services.
2. _____: _____: _____: _____. Under the provisions of Neb. Rev. Stat. § 29-3803 (Reissue 1989), a person in the custody of the state Department of Correctional Services can make a written request to the director to expedite any untried indictments, informations, or complaints.
3. **Indictments and Informations: Complaints: Speedy Trial: Prosecuting Attorneys: Prisoners.** Under the provisions of Neb. Rev. Stat. § 29-3804 (Reissue 1989), a prosecutor can expedite the disposition of untried charges pending against a person in the custody of the state Department of Correctional Services.

4. **Prisoners: Judgments: Speedy Trial.** Any purported judgment subject to the expediting provisions of Neb. Rev. Stat. §§ 29-3801 through 29-3809 (Reissue 1989) which is rendered beyond the nonextended 180-day deadline is void.
5. **Judgments: Jurisdiction: Collateral Attack.** A judgment entered by a court lacking subject matter jurisdiction is void and may be attacked at any time in any proceeding.
6. **Habeas Corpus: Judgments: Collateral Attack.** Habeas corpus is a proper means of collaterally attacking the validity of a void judgment.
7. **Judgments: Jurisdiction: Appeal and Error.** When no factual dispute is involved, determination of a jurisdictional issue is a matter of law which requires an appellate court to reach a conclusion independent from the trial court's conclusion on the issue.
8. **Habeas Corpus: Proof.** Habeas corpus requires the showing of legal cause, that is, that a person is detained illegally and is entitled to the benefits of the writ.
9. **Habeas Corpus: Prisoners: Appeal and Error.** When habeas corpus is used to test the validity of adult criminal detention, factual issues are to be reviewed as in actions at law.
10. **Judgments: Appeal and Error.** The findings of the trial court in a law action in which the court served as the finder of fact have the effect of a verdict and will not be set aside unless clearly erroneous.
11. **Verdicts: Appeal and Error.** In determining the sufficiency of the evidence to sustain a verdict in a civil case, an appellate court considers the evidence most favorably to the successful party and resolves evidentiary conflicts in favor of such party, who is entitled to every reasonable inference deducible from the evidence.
12. **Judgments: Appeal and Error.** In reviewing a judgment in a law action in which the trial court was the finder of fact, an appellate court does not reweigh the evidence, but considers the evidence in a light most favorable to the successful party and resolves evidentiary conflicts in favor of that party, who is entitled to every reasonable inference deducible from the facts.
13. **Trial: Evidence: Appeal and Error.** When evidence is in conflict, an appellate court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts rather than another.
14. **Judgments.** The language of a judicial opinion must be read in the context of the facts under consideration and its meaning limited by those facts.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Richard L. Goos for appellant.

Don Stenberg, Attorney General, and Laurie Smith Camp for appellee.

HASTINGS, C.J., WHITE, CAPORALE, FAHRNBRUCH, and LANPHIER, JJ., and BOSLAUGH, J., Retired.

CAPORALE, J.

I. STATEMENT OF CASE

The petitioner-appellant, Con M. Bradley, unsuccessfully sought a writ of habeas corpus directing the respondent-appellee, Frank X. Hopkins, to release him from custody on the ground that the criminal trial court lacked jurisdiction to entertain the charges lodged against him while incarcerated on unrelated convictions. He asserts such was the case because he was not tried within the time required by Nebraska's "disposition of untried charges" statutes, Neb. Rev. Stat. §§ 29-3801 through 29-3809 (Reissue 1989), hereinafter referred to as the act. Inasmuch as Bradley's sentences on the charges at issue include imprisonment for life, his challenge to the judgment of the habeas corpus court was docketed in this court. Neb. Rev. Stat. § 24-1106 (Cum. Supp. 1992). In so doing, Bradley asserts, in summary, that the habeas corpus court erroneously concluded that (1) the criminal trial was timely and (2) he was not deprived of the due process right to such a trial afforded him by the act. We affirm.

II. THE ACT

The act provides a mechanism for the disposition of untried indictments, informations, and complaints pending in this state against a person already in the custody of the state Department of Correctional Services. Once the expediting provisions of the act are invoked, it is required that, with certain exceptions, pending charges be resolved within a 180-day deadline. Two mechanisms exist which trigger the deadline. One is activated by the inmate and the other by the prosecutor. *State v. Ebert*, 235 Neb. 330, 455 N.W.2d 165 (1990). See *State v. Soule*, 221 Neb. 619, 379 N.W.2d 762 (1986).

A person in the custody of the department can make a written request to the director to expedite any untried indictments, informations, or complaints. § 29-3803. If the inmate does so, the director must forward the request to the court having jurisdiction and send along a certificate outlining the inmate's status, length of incarceration, and other data. The director must also furnish a certificate to the prosecutor with like information.

Section 29-3803 reads:

> Any person who is imprisoned in a facility operated by the Department of Correctional Services may request in writing to the director final disposition of any untried indictment, information, or complaint pending against him or her in this state. Upon receiving any request from a prisoner for final disposition of any untried indictment, information, or complaint, the director shall:
>
> (1) Furnish the prosecutor with a certificate stating the term of commitment under which the prisoner is being held, the time already served on the sentence, the time remaining to be served, the good time earned, the time of the prisoner's parole eligibility, and any decision of the Board of Parole relating to the prisoner;
>
> (2) Send by registered or certified mail, return receipt requested, one copy of the request and the certificate to the court in which the untried indictment, information, or complaint is pending and one copy to the prosecutor charged with the duty of prosecuting it; and
>
> (3) Offer to deliver temporary custody of the prisoner to the appropriate authority in the city or county where the untried indictment, information, or complaint is pending.

A prosecutor can also expedite the disposition of untried charges and start the 180-day clock. See § 29-3804. If a prosecutor has lodged a detainer against an inmate, that prosecutor is entitled to have the inmate made available upon presenting the director with a written request for temporary custody or availability, made through the court having jurisdiction of the untried charges. Upon receipt of this request, the director must issue a certificate to the prosecutor containing certain information concerning the incarceration and offer to deliver temporary custody of the inmate to the authority in the jurisdiction where the charges are pending.

Section 29-3804 provides:

> The prosecutor in a city or county in which an untried indictment, information, or complaint is pending shall be entitled to have a prisoner, against whom he or she has lodged a detainer and who is serving a term of imprisonment in any facility operated by the Department

> of Correctional Services, made available upon presentation of a written request for temporary custody or availability to the director. The court having jurisdiction of such indictment, information, or complaint shall duly approve, record, and transmit the prosecutor's request. Upon receipt of the prosecutor's written request the director shall:
>
> (1) Furnish the prosecutor with a certificate stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the good time earned, the time of the prisoner's parole eligibility, and any decision of the Board of Parole relating to the prisoner; and
>
> (2) Offer to deliver temporary custody of the prisoner to the appropriate authority in the city or county where the untried indictment, information, or complaint is pending in order that speedy and efficient prosecution may be had.

Once the expediting provisions are activated by either the inmate pursuant to § 29-3803 or the prosecutor pursuant to § 29-3804, the State must, unless the deadline is extended, generally try the inmate or otherwise dispose of the charges within 180 days after the prosecution receives the director's certificate. § 29-3805. Failing that, all Nebraska state courts are divested of jurisdiction to deal with the charges. Section 29-3805 declares:

> Within one hundred eighty days after the prosecutor receives a certificate from the director pursuant to section 29-3803 or 29-3804 or within such additional time as the court for good cause shown in open court may grant, the untried indictment, information, or complaint shall be brought to trial with the prisoner or his or her counsel being present. The parties may stipulate for a continuance or a continuance may be granted on a notice to the attorney of record and an opportunity for him or her to be heard. If the indictment, information, or complaint is not brought to trial within the time period stated in this section, including applicable continuances, no court of this state shall any longer have jurisdiction thereof nor shall the untried indictment, information, or complaint be

of any further force or effect and it shall be dismissed with prejudice.

It therefore follows that any purported judgment subject to the expediting provisions of the act which is rendered beyond the nonextended 180-day deadline is void, for a judgment entered by a court lacking subject matter jurisdiction is such and may be attacked at any time in any proceeding. *VonSeggern v. Willman*, 244 Neb. 565, 508 N.W.2d 261 (1993); *Marshall v. Marshall*, 240 Neb. 322, 482 N.W.2d 1 (1992).

III. SCOPE OF REVIEW

As Bradley claims that the criminal court lacked subject matter jurisdiction and that its judgment was thus void, habeas corpus is a proper means of collaterally attacking the validity of his judgment of conviction. See *Berumen v. Casady*, 245 Neb. 936, 515 N.W.2d 816 (1994).

When no factual dispute is involved, determination of a jurisdictional issue is a matter of law which requires an appellate court to reach a conclusion independent from the trial court's conclusion on the issue. *Riley v. State*, 244 Neb. 250, 506 N.W.2d 45 (1993); *24th and Dodge Ltd. v. Commercial Nat. Bank*, 243 Neb. 98, 497 N.W.2d 386 (1993).

However, as becomes clear in parts IV and V, whether subject matter jurisdiction in the criminal court existed depends in part upon the resolution of a factual issue. Thus, we must determine how we treat the habeas corpus court's findings in that regard. That depends upon whether habeas corpus is to be treated as an action at law or one in equity.

We begin that inquiry by noting that habeas corpus requires the showing of legal cause, that is, that a person is detained illegally and is entitled to the benefits of the writ. *Nicholson v. Sigler*, 183 Neb. 24, 157 N.W.2d 872 (1968), *cert. denied* 393 U.S. 876, 89 S. Ct. 174, 21 L. Ed. 2d 148. See, *Stone v. Powell*, 428 U.S. 465, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976); *State, ex rel., v. Fabisinski*, 111 Fla. 454, 152 So. 207 (1933). Technically, habeas corpus is not an action or suit. *Id.* Cf. *In re Application of Tail, Tail v. Olson*, 144 Neb. 820, 14 N.W.2d 840 (1944) (court noted that proceedings not adversarial and there is no suit between detainee and officer; rather, officer responds to

court's writ). Instead, habeas corpus is considered a summary remedy open to persons detained illegally. *Neudeck v. Buettow*, 166 Neb. 649, 90 N.W.2d 254 (1958); *In re Application of Tail, supra*; *Fabisinski, supra*.

Since the ultimate issue is the legality of detention, other jurisdictions have stated specifically that habeas corpus is a legal remedy rather than an equitable one. See, *State ex rel. Kopp v. Headley*, 60 So. 2d 734 (Fla. 1952); *Fabisinski, supra*; *State ex rel. Eggleston v. Hatrak*, 54 Or. App. 974, 636 P.2d 1017 (1981).

Nonetheless, because when used to determine child custody issues equitable principles predominate, with the best interests of the child being paramount, see *Uhing v. Uhing*, 241 Neb. 368, 488 N.W.2d 366 (1992), we have held that factual issues in such instances are determined de novo on the record, *id.*

On the other hand, equitable considerations such as whether a detention is unjust, arbitrary, or unreasonable are generally not involved in habeas corpus cases dealing with adult criminal detention because the legality of detention is the ultimate issue. See *Headley, supra*. We thus conclude that when habeas corpus is used to test the validity of adult criminal detention, factual issues are to be reviewed as in actions at law. See *Smallman v. Gladden*, 206 Or. 262, 291 P.2d 749 (1955), *overruled on other grounds, State v. Collis*, 243 Or. 222, 413 P.2d 53 (1966).

The findings of the trial court in a law action in which the court served as the finder of fact have the effect of a verdict and will not be set aside unless clearly erroneous. *Gibb v. Strickland*, 245 Neb. 325, 513 N.W.2d 274 (1994); *Diefenbaugh v. Rachow*, 244 Neb. 631, 508 N.W.2d 575 (1993). See *Anderson v. Transit Auth. of City of Omaha*, 241 Neb. 771, 491 N.W.2d 311 (1992).

IV. FACTS

On June 27, 1988, a complaint was filed charging Bradley with first degree murder in Saline County. A warrant for his arrest was signed the same day. On the following day, June 28, he was brought before the Saline County Court. Following this appearance, the department, because of the pending criminal investigation, placed Bradley in segregated confinement at its

penitentiary. An amended complaint was filed the next day, June 29, adding a use of firearms to commit a felony charge.

A hearing was held in the county court on July 5 to present the amended complaint, and transportation for Bradley by the Saline County sheriff was ordered by the county court. At an August 18 preliminary hearing, Bradley was bound over to the district court for arraignment and trial.

A request for a formal detainer against Bradley was not made until December 14. Bradley was informed of the existence of a detainer on January 10, 1989, and told of his right to request disposition of untried charges.

Bradley asserts that on July 1, 1988, he sent a form through the penitentiary's institutional mail service to the director of the department, requesting a disposition of the untried charges. Bradley received no response and admits that he did not follow up on his disposition request. However, he assumed the request was received because he "was going in and out to court," and claims that other request forms had gone unanswered.

The director's administrative secretary could not recall ever having seen a disposition request from Bradley. The normal procedure would have required the secretary to forward such a form to the department's special services. The supervisor of special services, who also served as the deputy detainer administrator, testified that his files contained neither a copy nor the original of the form. Nor did his files contain a certificate from the director to the court authorities requesting disposition of the charges. The supervisor also testified that if a county wants a penitentiary inmate for prosecution on untried charges, it generally must have a court order from a district court. However, his office handles these procedures only if there is a detainer in place and the office is "activating that request under the Inter-State Detainer Compact or the Inter-State Agreement on Detainers." Otherwise, if there is only a court order and no detainer on an inmate, the department's records manager handles the transfers.

The records manager testified that Bradley's "central inmate file" would normally contain detainer documents and other documents pertaining to untried charges. He testified that detainer documents are placed in the file after they have been

forwarded from the detainer administrator's office. Although the central file contained documents generated when Bradley was placed in segregation following his return from his first county court appearance, it did not contain either a disposition request form, a copy of the arrest warrant, or any transportation documents.

The trial in criminal court took place more than 180 days after Bradley claims to have sent his disposition request, and thus more than 180 days from Bradley's first appearance in county court.

V. ANALYSIS

1. Timeliness of Criminal Trial

As noted in part I, Bradley claims, in connection with the first summarized assignment of error, that the trial in criminal court was untimely. In rejecting that claim, the habeas corpus court (a) found that Bradley did not activate the expediting provisions of § 29-3803 and (b) concluded that Bradley's first appearance in county court did not activate the expediting provisions of § 29-3804.

(a) Disposition Request

Bradley urges that the evidence is insufficient to support the habeas corpus court's rulings. In regard to the disposition request question, the habeas corpus court specifically noted it was not persuaded that Bradley made such a request, thus finding that Bradley did not make the request he claims to have made.

Having resolved in part III that in cases such as this, fact issues are to be reviewed as in actions at law, we recall that in determining the sufficiency of the evidence to sustain a verdict in a civil case, an appellate court considers the evidence most favorably to the successful party and resolves evidentiary conflicts in favor of such party, who is entitled to every reasonable inference deducible from the evidence. *Petska v. Olson Gravel, Inc.*, 243 Neb. 568, 500 N.W.2d 828 (1993).

In such a review, an appellate court does not reweigh the evidence, but considers the evidence in a light most favorable to the successful party and resolves evidentiary conflicts in favor

of that party, who is entitled to every reasonable inference deducible from the facts. *Peterson v. Kellner*, 245 Neb. 515, 513 N.W.2d 517 (1994).

When evidence is in conflict, as it is here, an appellate court may consider and give weight to the fact that the trial court observed the witnesses and accepted one version of the facts rather than another. *In re Interest of L.J., M.J., and K.J.*, 238 Neb. 712, 472 N.W.2d 205 (1991).

It is significant that the disposition request form does not appear in any file in which one would expect it to be, and while there was some testimony that Bradley discussed this form with counsel around the time of the criminal trial, there is no testimony by anyone other than Bradley that the form ever existed.

Under that state of the record, we cannot say the habeas corpus court's finding that Bradley did not make the disposition request he claims to have made is clearly erroneous. Once it is found that Bradley made no request, it necessarily follows that none of the expediting steps of § 29-3803 were put in operation.

(b) Court Appearance

This brings us to Bradley's claim that pursuant to § 29-3804, the criminal trial was required to have commenced within 180 days of when he first appeared in county court on June 28, 1988; that is, the act of the prosecutor in causing Bradley to appear before a court started the running of the 180-day clock, notwithstanding the lack of a certificate from the director to the prosecutor.

In making that claim, Bradley relies principally on our opinion in *State v. Ebert*, 235 Neb. 330, 455 N.W.2d 165 (1990). Therein, we affirmed the district court's judgment of conviction against the defendant's claim that he should have been discharged because he had not been tried within the time limit specified in the "discharge from custody or recognizance" statutes, Neb. Rev. Stat. § 29-1201 et seq. (Reissue 1989). The *Ebert* court held that as the defendant was incarcerated in Nebraska when the detainer was filed with the department, the matter was controlled not by the discharge from custody or recognizance statutes, but by the act here at issue. In the course

of illustrating the methods by which the act's deadline could be invoked, we wrote:

> These sections [§§ 29-3801 to 29-3809] do not require the prosecutor to file a detainer against any prisoner, but only require that a detainer be filed if the prosecutor elects to seek temporary custody or availability of a prisoner pursuant to § 29-3804. The filing of a detainer is not required in order for a prisoner to assert his or her right to a speedy trial pursuant to § 29-3803.

Ebert, 235 Neb. at 335, 455 N.W.2d at 168.

Seizing upon the last sentence of the foregoing language, Bradley concludes *Ebert* means that the act's 180-day clock begins to run as soon as prison officials learn of pending untried charges, even if a formal detainer was not filed and notwithstanding the failure of the director to issue the certificate contemplated by the act. Such a reading is unwarranted.

The first sentence of the quoted language does nothing more than explain that the act does not require that a prosecutor ever file a detainer. Only if and when the prosecutor seeks temporary custody or availability of the inmate pursuant to the act must such be done. If such is done, the expediting provisions of § 29-3804 come into play; if no detainer is filed, they do not. The last sentence of the quoted language merely explains that the inmate need not wait for the filing of a detainer, but, rather, may start the running of the 180-day clock by invoking the expediting provisions of § 29-3803.

Bradley attempts to bolster his unwarranted reading of the quoted language by pointing out that the *Ebert* court computed that the defendant had been timely tried, notwithstanding the failure of the record to establish whether the prosecutor had ever received a certificate from the director. But that analysis must be read in light of the facts at issue and the holding in light of those facts. See, *Abbott v. Gould, Inc.*, 232 Neb. 907, 443 N.W.2d 591 (1989), *cert. denied* 493 U.S. 1073, 110 S. Ct. 1119, 107 L. Ed. 2d 1026; *Douglas County v. Vinsonhaler*, 82 Neb. 810, 118 N.W. 1058 (1908) (language of judicial opinion must be read in context of facts under consideration and its meaning limited by those facts). The *Ebert* holding reads:

> The record shows that the defendant was fully aware of the complaint pending against him in Lancaster County, but did not take advantage of the provisions of § 29-3803 to secure disposition of this charge. The prosecutor has no duty to proceed pursuant to § 29-3804, and the defendant was not entitled to be discharged pursuant to § 29-3805. The defendant agreed to be tried on a stipulation of facts and has shown no prejudice resulting from the delayed trial of this matter.

235 Neb. at 335-36, 455 N.W.2d at 169.

The computation was made only to dispel any notion that there may have been some basis other than the act on which to claim that the timing of the trial somehow entitled the defendant to be discharged.

2. Due Process

In the second summarized assignment of error, Bradley argues that the mandatory language of the act gave him a due process right to a timely trial, a right which the habeas corpus court ignored. But as neither the expediting provisions of § 29-3803 nor of § 29-3804 were ever invoked, the deadline contained in § 29-3805 never came into play. Thus, the disposition of the first summarized assignment of error against Bradley necessarily disposes of the second summarized assignment of error against him as well.

VI. JUDGMENT

For the foregoing reasons we, as first noted in part I, affirm the judgment of the habeas corpus court.

Affirmed.

Wright, J., participating on briefs.

DINA MERRICK, APPELLANT, V. PATRICK J. THOMAS, SHERIFF, ET AL., APPELLEES.

522 N.W.2d 402

Filed October 7, 1994. No. S-92-1002.

1. **Demurrer: Pleadings: Appeal and Error.** In reviewing a ruling on a general demurrer, an appellate court accepts as true all well-pled facts and the proper and reasonable inferences of law and fact, but not the conclusions of the pleader.
2. _____: _____: _____. In reviewing a ruling on a general demurrer, an appellate court cannot assume the existence of a fact not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial.
3. _____: _____: _____. An appellate court will overrule the sustaining of a demurrer if the petition, when liberally construed, states a cause of action.
4. **Pleadings: Words and Phrases.** A statement of facts sufficient to constitute a cause of action, as used in Neb. Rev. Stat. § 25-806(6) (Reissue 1989), means a narrative of events, acts, and things done or omitted that show a legal liability of the defendant to the plaintiff.
5. **Political Subdivisions Tort Claims Act: Negligence.** A negligence action brought under the Political Subdivisions Tort Claims Act has the same elements as a negligence action against a private individual.
6. **Negligence: Proof.** In order to prevail on a negligence action, a plaintiff must establish the defendant's duty not to injure the plaintiff, a breach of that duty, proximate causation, and damages.
7. **Negligence.** Whether a legal duty in a negligence action exists is a question of law dependent on the facts in a particular situation.
8. **Negligence: Words and Phrases.** Duty is an obligation, which the law recognizes and gives effect, to conform to a particular standard of conduct toward another.
9. **Negligence.** A common-law duty exists to use due care so as not to negligently injure another person.
10. _____. The duty of reasonable care generally does not extend to third parties absent fraud or other facts establishing a duty.
11. **Negligence: Employer and Employee.** In employee negligence situations, whether the defendant owed a duty of reasonable care to the third person or only to the employer depends upon whether the employee was called upon to act and use proper care to prevent injury to the third person or whether some relationship between the parties existed thereby creating a duty.
12. **Negligence.** Foreseeability is a factor in establishing a duty.
13. **Negligence: Proximate Cause: Trial.** Determination of causation is, ordinarily, a matter for the trier of fact.
14. **Negligence: Proximate Cause: Proof.** The plaintiff must meet three basic requirements in establishing proximate cause: (1) Without the negligent action, the injury would not have occurred, commonly known as the "but for" rule; (2) the injury was a natural and probable result of the negligence; and (3) there was no efficient intervening cause.
15. **Negligence: Words and Phrases.** An efficient intervening cause is a new and

independent force intervening between the defendant's negligent act and the plaintiff's injury by the negligence of a third person who had full control of the situation, whose negligence the defendant could not anticipate or contemplate, and whose negligence resulted directly in the plaintiff's injury.

16. **Breach of Contract: Forbearance: Estoppel.** A promise which the promisor should reasonably expect to induce action or forbearance is binding if injustice can be avoided only by enforcement of the promise. Promissory estoppel requires a reasonable and foreseeable reliance.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Mark E. Novotny, of Kennedy, Holland, DeLacy & Svoboda, for appellant.

Donald J. Straka, of Brashear & Ginn, for appellees.

HASTINGS, C.J., WHITE, CAPORALE, FAHRNBRUCH, and LANPHIER, JJ., and BOSLAUGH, J., Retired.

HASTINGS, C.J.

Dina Merrick appeals from the judgment of the district court sustaining the defendants' demurrer and dismissing Merrick's action for negligence and promissory estoppel. Merrick appealed to the Nebraska Court of Appeals, and we removed the case to this court under the authority of Neb. Rev. Stat. § 24-1106(3) (Cum. Supp. 1992) in order to regulate the caseloads of the appellate courts.

In reviewing a ruling on a general demurrer, an appellate court accepts as true all well-pled facts and the proper and reasonable inferences of law and fact, but not the conclusions of the pleader. *Durand v. Western Surety Co.*, 245 Neb. 649, 514 N.W.2d 840 (1994); *Hamilton v. City of Omaha*, 243 Neb. 253, 498 N.W.2d 555 (1993). The court cannot assume the existence of a fact not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial. *DeVaux v. DeVaux*, 245 Neb. 611, 514 N.W.2d 640 (1994); *Wheeler v. Nebraska State Bar Assn.*, 244 Neb. 786, 508 N.W.2d 917 (1993), *cert. denied* ____ U.S. ____, 114 S. Ct. 1835, 128 L. Ed. 2d 463 (1994). An appellate court will overrule the sustaining of a demurrer if the petition, when liberally construed, states a cause of action. *Id.* A statement of facts

sufficient to constitute a cause of action, as used in Neb. Rev. Stat. § 25-806(6) (Reissue 1989), means a narrative of events, acts, and things done or omitted that show a legal liability of the defendant to the plaintiff. *Lawyers Title Ins. Corp. v. Hoffman*, 245 Neb. 507, 513 N.W.2d 521 (1994); *Wheeler v. Nebraska State Bar Assn., supra.*

Merrick claims that the trial court erred in sustaining the demurrer and dismissing Merrick's second amended petition.

Merrick's second amended petition named as defendants Patrick J. Thomas, as sheriff of Sarpy County; Randy Furby, as chairman of the Sarpy County Sheriff's Merit Commission; and Sarpy County itself. She alleged that the two individual defendants were agents and employees of Sarpy County, acting in its behalf; that pursuant to public notice Merrick, on October 20, 1990, filed an application for a position of employment with the sheriff's department; that as part of her application she was required to be and was tested by the merit commission and was notified that she had passed; that on April 17, 1991, she was offered a permanent position by Thomas and that she accepted such employment and left her former job; and that on August 14, 1991, she was informed by the sheriff's department that her employment was being terminated because she failed to pass the merit commission test. Merrick further alleged negligence on the part of the defendants in that (1) they failed to ensure adequate and proper scoring of her test, (2) they failed to ascertain true and correct scores, (3) they offered her a position for which she had not qualified by failing to pass the test, and (4) they offered her a position with the sheriff's department inducing her to terminate her previous employment when they knew or should have known that her test scores were inadequate to qualify her as an employee of the defendants. Merrick further alleges that (1) she justifiably relied upon the scoring of her merit examination and the representation by Thomas in offering her employment, and (2) she was offered, promised, and accepted employment at the sheriff's department, and relying on the employment offer, she resigned her full-time employment at her former place of employment. Thus, Merrick seeks damages based on negligence as well as on promissory estoppel.

A negligence action brought under the Political Subdivisions Tort Claims Act has the same elements as a negligence action against a private individual. *Hamilton v. City of Omaha, supra.* In order to prevail on a negligence action, a plaintiff must establish the defendant's duty not to injure the plaintiff, a breach of that duty, proximate causation, and damages. *Anderson v. Nashua Corp., ante* p. 420, 519 N.W.2d 275 (1994); *Haselhorst v. State*, 240 Neb. 891, 485 N.W.2d 180 (1992). Whether a legal duty exists is a question of law dependent on the facts in a particular situation. *Anderson v. Nashua Corp., supra*; *Parrish v. Omaha Pub. Power Dist.*, 242 Neb. 783, 496 N.W.2d 902 (1993). Duty is an obligation, which the law recognizes and gives effect, to conform to a particular standard of conduct toward another. *Tiede v. Loup Power Dist.*, 226 Neb. 295, 411 N.W.2d 312 (1987).

Merrick argues that the defendants owed her a duty to score her test and offer her employment accurately and fairly. Merrick reasons that because the defendants' actions "regulated or governed" the conduct of others, the defendants owed a duty to act in "such a manner that those rightfully led to act on the faith of the performance of the Defendants shall not suffer a loss or injury through their negligence." Brief for appellant at 27. The defendants argue that the merit commission owes a duty to the sheriff to accurately score the test, but not to the applicant.

A common-law duty exists to use due care so as not to negligently injure another person. See *Dieter v. Hand*, 214 Neb. 257, 333 N.W.2d 772 (1983). Nevertheless, the duty of reasonable care generally does not extend to third parties absent fraud or other facts establishing a duty. *Lawyers Title Ins. Corp. v. Hoffman*, 245 Neb. 507, 513 N.W.2d 521 (1994). In employee negligence situations, whether the defendant owed a duty of reasonable care to the third person or only to the employer depends upon whether the employee was called upon to act and use proper care to prevent injury to the third person or whether some relationship between the parties existed thereby creating a duty. *Dieter v. Hand, supra.* Therefore, Merrick must have alleged sufficient facts in the petition to show some relationship between herself and the defendants in

regard to scoring the test.

We have often stated that foreseeability is a factor in establishing a duty. *Ditloff v. Otto*, 239 Neb. 377, 476 N.W.2d 675 (1991); *Union Pacific RR. Co. v. Kaiser Ag. Chem. Co.*, 229 Neb. 160, 425 N.W.2d 872 (1988); *Holden v. Urban*, 224 Neb. 472, 398 N.W.2d 699 (1987). Recently, in *Lawyers Title Ins. Corp. v. Hoffman, supra*, we addressed whether a surveyor owes a duty to a relying third party. The surveyor retained an engineering firm to perform a survey. The engineering firm relied on pins placed by an organization that had performed a survey of the land approximately 9 years earlier. When the surveyor sued, alleging that the engineering firm breached its contract by preparing an incorrect survey, the engineering firm sued the original surveyors for their incorrect pin placements. We held that a duty did not exist from the original surveyors to the engineering firm because no privity of contract existed, the petition did not allege fraud or false representation, and the petition did not allege how the original surveyor could foresee that a subsequent surveyor would rely on the pin placements 9 years later.

The U.S. District Court for the Central District of Illinois also addressed whether an erroneous evaluation created a duty to a relying third party. In *U.S. Ecology, Inc. v. Carlson*, 638 F. Supp. 513 (C.D. Ill. 1986), U.S. Ecology operated a chemical waste disposal site and alleged that an engineering firm that contracted with the U.S. Environmental Protection Agency had negligently evaluated the site. U.S. Ecology argued that the negligent evaluation resulted in a negative business reputation and possible loss of business. The court disagreed, holding that the engineering firm could not foresee an injury that rested on a remote and unlikely chain of circumstances involving intervening parties and events extending over a period of time.

The events alleged by Merrick, however, are close in time and direct in relation to each other. Thus, when we analyze the foreseeability of harm to the plaintiff, it appears that, construing her petition liberally, Merrick alleged sufficient facts to establish that Furby and Sarpy County owed her a duty to score her test with due care. The merit commission could foresee that Merrick, by the act of applying, desired the job and

would rely on the results of a prerequisite test for that job. It is reasonably foreseeable that an inaccurate passing score could result in Merrick's name being given to the sheriff as a qualified applicant and that, approximately 6 months after taking the test, Merrick would be offered a job that she was not qualified for. Last, it is reasonably foreseeable that acceptance of the offer would, with a high degree of certainty, cause injury when officials discovered the true test score. The defendants argue that the only duty owed is to the sheriff who receives the test score pursuant to Neb. Rev. Stat. § 23-1731 (Reissue 1991). Section 23-1731, however, does not limit the duty of the merit commission; it only requires the commission to certify to the sheriff the three highest standing candidates on the eligibility list for a vacant position. As stated earlier, the duty owed Merrick is rooted in common law.

Determination of causation is, ordinarily, a matter for the trier of fact. *Vilas v. Steavenson*, 242 Neb. 801, 496 N.W.2d 543 (1993); *Maresh v. State*, 241 Neb. 496, 489 N.W.2d 298 (1992). The plaintiff must meet three basic requirements in establishing proximate cause: (1) Without the negligent action, the injury would not have occurred, commonly known as the "but for" rule; (2) the injury was a natural and probable result of the negligence; and (3) there was no efficient intervening cause. *Vilas v. Steavenson, supra.*

It is undisputed that "but for" the inaccurate test results, Thomas could not have offered Merrick employment, and that Merrick left her former position because she accepted the offer from Thomas. Thus, Merrick established the first two elements of proximate cause.

As to the third element, an efficient intervening cause is a new and independent force intervening between the defendant's negligent act and the plaintiff's injury by the negligence of a third person who had full control of the situation, whose negligence the defendant could not anticipate or contemplate, and whose negligence resulted directly in the plaintiff's injury. *Shelton v. Board of Regents*, 211 Neb. 820, 320 N.W.2d 748 (1982). Thomas' hiring decision is not an efficient intervening cause. There does not exist any evidence that Thomas acted negligently when he followed § 23-1731 by hiring personnel

from the merit commission's list of qualified applicants. Furthermore, a reasonable mind could infer that the merit commission could anticipate and contemplate that any person listed as passing the merit commission test could be hired. Therefore, as we view the evidence in the light most favorable to the plaintiff, Merrick provided a narrative of events which allow a reasonable inference that Furby and Sarpy County acted negligently in scoring her test and putting her on a list of qualified applicants. Merrick needed only to state a cause of action in her petition. The inference is clear; whether the jury would accept the inference is another matter. See *Tank v. Peterson*, 219 Neb. 438, 363 N.W.2d 530 (1985).

Merrick also alleged that Thomas acted negligently in offering her employment and then firing her when he learned that she failed the examination. Merrick's only argument regarding Thomas' negligence is that he based "an employment decision on the scoring of said tests." Brief for appellant at 28. Likewise, the second amended petition merely presents conclusions that Thomas offered employment based on inaccurate test results and that he should have known of the inaccuracy. Merrick's conclusory statements do not allege facts establishing a duty, breach of duty, causation, or injury. Furthermore, Thomas did not base the employment decision on the test result, but made a judgment from the list of names certified to him from the merit commission pursuant to § 23-1731. Thus, Merrick did not allege sufficient facts to state a cause of action for negligence against Thomas.

As to Merrick's second cause of action under the doctrine of promissory estoppel, a promise which the promisor should reasonably expect to induce action or forbearance is binding if injustice can be avoided only by enforcement of the promise. Promissory estoppel requires a reasonable and foreseeable reliance. *Hawkins Constr. Co. v. Reiman Corp.*, 245 Neb. 131, 511 N.W.2d 113 (1994); Restatement (Second) of Contracts § 90 (1981). The promise does not have to meet the requirements of an offer that, if accepted, would ripen into a contract. *Whorley v. First Westside Bank*, 240 Neb. 975, 485 N.W.2d 578 (1992).

Merrick argues that her petition sufficiently alleged that she

left her position with Earl May Garden Center in reasonable reliance on the scoring of her merit commission test and Thomas' offer of employment. The defendants contend that Merrick did not rely on the scoring of her test because she did not leave her previous job until she accepted the offer of employment. Furthermore, according to the defendants, Thomas only promised her at-will employment and satisfied the promise when she began work.

Merrick did not allege facts showing that the test score induced her to act to her detriment. Merrick received the passing test score nearly 6 months prior to the job offer. The record does not indicate any induced actions by Merrick during the approximate 6-month period. Her act of leaving the manager-trainee program at Earl May occurred after she was offered employment as a deputy sheriff of Sarpy County.

Therefore, Merrick's promissory estoppel argument rests on the offer of employment from Thomas. Furthermore, the record indicates that she worked as deputy sheriff for a short time until terminated as unqualified based on the failing test score. Merrick does not dispute the defendants' argument that she was an at-will employee. Consequently, the situation which we find is that the promise was one to offer at-will employment, which promise was kept, and estoppel is not available.

In summary, Merrick's petition failed to state a cause of action for promissory estoppel, and to that extent, the demurrer was properly sustained. No cause of action was stated against Thomas as to negligence, but there were sufficient allegations to support a claim of negligence against Furby and Sarpy County, and the district court's judgment in dismissing the case as to those defendants was in error.

The judgment of the district court is affirmed in part and in part reversed and remanded for further proceedings.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WRIGHT, J., participating on briefs.

CARL E. WOLLENBURG, APPELLANT, V. JACK CONRAD, DIRECTOR OF THE DEPARTMENT OF MOTOR VEHICLES OF THE STATE OF NEBRASKA, APPELLEE.

522 N.W.2d 408

Filed October 7, 1994. No. S-93-076.

1. **Administrative Law: Motor Vehicles: Appeal and Error.** An appellate court's review of a district court's review of a decision of the director of the Department of Motor Vehicles is de novo on the record.
2. **Notice: Waiver.** Notice may be waived in writing or may be implied from unequivocal conduct.
3. **Motor Vehicles: Licenses and Permits: Due Process.** Before a state may deprive a motorist of his driver's license and vehicle registration, a state must provide a forum for the determination of the question and a meaningful hearing appropriate to the nature of the case.
4. **Administrative Law: Motor Vehicles: Licenses and Permits: Records: Appeal and Error.** Upon a petition for review of an order of suspension of a driver's license, the district court is required to consider the record made before the director. The district court must consider any additional facts developed in the hearing before that court.
5. **Administrative Law: Motor Vehicles: Licenses and Permits: Due Process: Appeal and Error.** The district court must give the appellant who is challenging the suspension of his driver's license an opportunity to adduce evidence.
6. **Motor Vehicles: Railroads.** A motorist approaching a railroad crossing has a duty to look and listen at a time and place when looking and listening will be effective to prevent an accident. Such motorist also has a duty to stop when a reasonably prudent person would have considered a stop necessary under the circumstances.
7. **Motor Vehicles: Negligence.** A driver ordinarily has a duty to drive an automobile on a public street at night in such a manner that he or she can stop in time to avoid a collision with an object within the area lighted by his or her vehicle's headlights, and the driver is negligent if he or she fails to do so.

Appeal from the District Court for Gage County: WILLIAM B. RIST, Judge. Affirmed.

Fredrick L. Swartz for appellant.

Don Stenberg, Attorney General, and Paul N. Potadle for appellee.

HASTINGS, C.J., WHITE, CAPORALE, FAHRNBRUCH, and LANPHIER, JJ., and BOSLAUGH, J., Retired.

FAHRNBRUCH, J.

Carl E. Wollenburg appeals the suspension of his driver's

license for failure to show proof of financial responsibility after he drove his pickup truck into the side of a Burlington Northern (BN) railroad car at a rural road crossing in Gage County.

Wollenburg's license was suspended by the Nebraska Department of Motor Vehicles (DMV). Upon appeal by Wollenburg, that ruling was affirmed by the district court for Gage County. We affirm the decision of the district court.

FACTS

On the evening of September 30, 1991, Wollenburg was operating his pickup with only one lighted headlight. At approximately 10:05 p.m., he drove his pickup into a BN railroad car at a crossing on a county road after several of the railroad cars had already passed. According to a state patrolman's report, the train was moving at approximately 10 miles per hour and at least two railroad cars were derailed as a result of the accident. Wollenburg claimed in his report that the train was stopped at the time of the accident.

On December 4, 1991, DMV mailed Wollenburg a state accident report form with a letter requesting that the form be "completed and returned to [DMV] immediately" in connection with Wollenburg's reportable accident. The letter advised Wollenburg that in the event that he was not covered by insurance, he was permitted either to file a witnessed or notarized release or agreement to cover all damages and injuries, or to deposit security in the amount of $10,000. Wollenburg was further informed that failure to comply with the Motor Vehicle Safety Responsibility Act by December 19, 1991, might result in the suspension of his Nebraska driving privileges.

On December 19, DMV notified Wollenburg by certified mail that upon reviewing reports and information in connection with the collision, DMV had determined there was a reasonable possibility of a judgment being rendered against Wollenburg. DMV also notified Wollenburg that his operator's license would be suspended effective January 7, 1992, unless he complied with the Motor Vehicle Safety Responsibility Act by either providing proof of liability insurance, posting a $10,000 security deposit, or filing a release or written agreement to

cover all claims of BN.

On January 3, 1992, DMV notified Wollenburg that suspension proceedings had been terminated because DMV's records indicated that Wollenburg had complied with the terms of the certified notice of suspension dated December 19, 1991.

On February 7, 1992, DMV was notified by Wollenburg's purported insurance carrier that his policy had lapsed in July 1991, which was prior to his collision with the BN train.

On February 27, by certified mail, DMV notified Wollenburg that because his insurance carrier denied coverage, his driver's license was to be suspended effective March 18, 1992. The letter of February 27 itself was addressed to Carl E. Wollenburg at RFD 1 - Box 184, DeWitt, NE 68341. Nowhere in the record is there a denial that that address was correct. Only one side of the return certified mail receipt card was introduced in evidence. That reflects that the certified mail notice sent to Wollenburg was receipted by "Marie A. Wollenburg" as "Agent." In the district court, Wollenburg testified that he had given his mother authority to sign for his mail and indicated that his mother had received it.

On March 19, 1992, Wollenburg filed a petition in the district court for Gage County challenging the suspension of his driver's license by DMV. Thereupon, pending a final court decision, the suspension was automatically stayed pursuant to Neb. Rev. Stat. § 60-503 (Reissue 1993). Following trial, the district court affirmed the suspension of Wollenburg's driver's license.

Wollenburg timely appealed to the Nebraska Court of Appeals. The case was removed to this court pursuant to our authority to regulate the caseloads of the appellate courts of this state.

ASSIGNMENTS OF ERROR

Summarized and restated, Wollenburg claims that the district court erred in (1) finding that DMV complied with the notice requirements of Neb. Rev. Stat. § 60-507 (Reissue 1993), (2) finding that DMV's determination of a reasonable possibility of a judgment being rendered against Wollenburg was supported by sufficient evidence and finding that due

process does not require a hearing at the departmental level so long as the licensee is afforded an opportunity to appeal such action and adduce evidence in support of his position, and (3) admitting into evidence exhibit 1, the transcript of DMV.

STANDARD OF REVIEW

An appellate court's review of a district court's review of a decision of the director of DMV is de novo on the record. *Jacobson v. Higgins*, 243 Neb. 485, 500 N.W.2d 558 (1993); *Larson v. Jensen*, 228 Neb. 799, 424 N.W.2d 352 (1988).

ANALYSIS

First, we turn to the issue of whether DMV complied with the notice requirement set forth in § 60-507(1). On February 27, 1992, DMV sent notice by certified mail to Wollenburg that his license was suspended effective March 18 for failure to establish financial responsibility.

Section 60-507(1) provides in part: "Notice of such suspension shall be sent by the Department of Motor Vehicles by certified mail to such operator not less than twenty days prior to the effective date of such suspension and shall state the amount required as security and the requirement of proof of financial responsibility." As stated, the return receipt bore the signature of "Marie A. Wollenburg" as "Agent."

It is Wollenburg's contention that DMV did not comply with the statutory requirement because the notice sent to him was not properly addressed and receipted. The purpose of addressing a letter is to assure that the letter is mailed to its intended receiver. Seeking a receipt for a letter is to prove that the letter was received by the intended receiver. In this case, there is absolutely no question that Wollenburg received the February 27 notice. It was sent by certified mail and receipted for by Wollenburg's mother, who had her son's permission to sign for the letter. The plain language of § 60-507(1) requires only that notice be sent by DMV by certified mail to such motor vehicle operator. It does not require that a return receipt be requested.

Moreover, notice may be waived in writing or may be implied from unequivocal conduct. *Versch v. Tichota*, 192 Neb. 251, 220 N.W.2d 8 (1974). In *Versch*, this court held that the

voluntary appearance by the city of Omaha when it was joined in the action and filed a petition was an unequivocal waiver of notice. Here, the record is clear that Wollenburg filed suit in the district court on March 19, the day after DMV's suspension of his license became effective. In doing so, Wollenburg waived any defect in service of the notice that DMV had suspended his driver's license by his unequivocal act of appealing that decision to the district court.

Wollenburg also challenges the Motor Vehicle Safety Responsibility Act as not complying with the Due Process Clauses of the Constitutions of the United States and the State of Nebraska. It is Wollenburg's contention that by not requiring a hearing at the departmental level at which the licensee may present evidence and cross-examine witnesses, the licensee's due process rights are not protected.

Wollenburg relies upon the safeguards set forth in this state's Administrative Procedure Act. This reliance is misplaced. Section 60-503(2) provides that "[t]he appeal procedures described in the Administrative Procedure Act shall not apply to this [appeal procedure] section."

Wollenburg also relies upon *Bell v. Burson*, 402 U.S. 535, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971), in which the U.S. Supreme Court held that Georgia's motor vehicle responsibility law failed to provide an uninsured motorist procedural due process. The Court held that before a state may deprive a motorist of his driver's license and vehicle registration, a state must provide "a forum for the determination of the question" and a meaningful hearing " 'appropriate to the nature of the case.' " 402 U.S. at 542.

Following the *Burson* opinion, the U.S. Supreme Court found, in *Jennings v. Mahoney*, 404 U.S. 25, 92 S. Ct. 180, 30 L. Ed. 2d 146 (1971), that the district court afforded the appellant procedural due process when it stayed the suspension order of the director of Utah's financial responsibility division pending completion of judicial review, and provided a hearing at which the appellant was afforded the opportunity to present evidence and cross-examine witnesses.

In this case, Wollenburg's due process rights were similarly protected. He was given adequate notice, the suspension of his

driver's license was stayed, and he was afforded an opportunity to present evidence and cross-examine witnesses at the hearing held in the district court for Gage County prior to the final suspension of his license. Under these circumstances, Wollenburg was afforded due process as required by *Burson* and *Jennings*. The due process requirements of Nebraska's Constitution are similar to those of the federal Constitution.

Finally, we turn to whether the trial court erred in admitting into evidence the DMV transcript. Our holding in *Hehn v. State*, 206 Neb. 34, 290 N.W.2d 813 (1980), is dispositive of this issue. In that case, we stated:

> It is elementary that, if the District Court is to determine whether the director's action was correct and if the director is required by [§ 60-507(3)] to consider all such reports and information filed in connection with the accident, then the record made before the director must be available to the District Court. To hold otherwise would . . . in effect, be requiring the court to review a record without permitting that record to be admitted into evidence. . . . The fact is that the record made before the director is admissible as evidence in the District Court because [§ 60-507(3)] plainly suggests that it is admissible.

206 Neb. at 36, 290 N.W.2d at 814-15. See, also, *Wroblewski v. Pearson*, 210 Neb. 82, 85, 313 N.W.2d 231, 233 (1981) (citing *Hehn* and holding that " '[u]pon a petition for review of an order of suspension of an operator's license by the director of the Department of Motor Vehicles, the District Court is *required* to consider the record made before the director' "). Wollenburg's complaint concerning the district court's admitting the DMV transcript into evidence is without merit.

In addition to considering the transcript of the DMV's proceedings, the district court must give the appellant who is challenging the suspension of his driver's license an opportunity to adduce evidence. Moreover, the district court must consider any additional facts developed in the hearing before that court. See, *Hehn v. State, supra*; *Berg v. Pearson*, 199 Neb. 390, 259 N.W.2d 275 (1977). Wollenburg's appeal in the district court was conducted in accordance with these principles.

The issue before DMV is whether the evidence supports a

finding that there is a reasonable possibility of a judgment. *Wroblewski v. Pearson, supra.* The scope of review of cases of this nature is a review of DMV's determination that there exists a reasonable possibility of a judgment. *Id.*

It is uncontroverted in the evidence that at the time of the accident, Wollenburg was operating his pickup with only one lighted headlight and that he drove the pickup into a BN railroad car at a crossing on a county road after several railroad cars had already passed. The train was either moving slowly, at approximately 10 miles per hour, as indicated by a state patrolman's report, or stopped entirely, as reported by Wollenburg himself. The record does not reveal any obstructions which would have affected a driver's view at the time of the collision. Wollenburg was given an opportunity at the hearing in district court to rebut the facts set forth in the reports but presented no evidence contradicting them.

In *Crewdson v. Burlington Northern RR. Co.*, 234 Neb. 631, 452 N.W.2d 270 (1990), we held that a motorist approaching a railroad crossing has a duty to look and listen at a time and place when looking and listening will be effective to prevent an accident. Such motorist also has a duty to stop when a reasonably prudent person would have considered a stop necessary under the circumstances. *Id.*

Moreover, a driver ordinarily has a duty to drive an automobile on a public street at night in such a manner that he or she can stop in time to avoid a collision with an object within the area lighted by his or her vehicle's headlights, and the driver is negligent if he or she fails to do so. See *Mantz v. Continental Western Ins. Co.*, 228 Neb. 447, 422 N.W.2d 797 (1988).

It is not the function of the Director of Motor Vehicles to weigh the alleged negligence or comparative negligence of the parties involved but to determine, based on reports, whether a reasonable possibility of liability exists. The facts contained in the reports before the director support a finding of a reasonable possibility of a judgment being rendered against Wollenburg.

In the case at bar, the director considered the reports made in connection with the accident. Wollenburg was required to file an accident report form with DMV, and his report failed to set forth any figure for damages for which he might be liable.

Therefore, the only estimate before the director was that of the state patrolman. The patrolman's estimate of the property damage to the railroad was $10,000, the amount the director set for the required security. The evidence presented to the district court did not contradict the patrolman's estimate. Therefore, DMV and the district court could properly conclude that there was a reasonable possibility of a $10,000 judgment against Wollenburg.

CONCLUSION

None of Wollenburg's assignments of error has merit. The suspension of Wollenburg's driver's license must be affirmed.

AFFIRMED.

WRIGHT, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. STANLEY JONES, APPELLANT.

522 N.W.2d 414

Filed October 7, 1994. No. S-93-360.

1. **Rules of the Supreme Court: Trial: Records.** Neb. Ct. R. of Official Ct. Rptrs. 4b(3) and (4) (rev. 1992) requires the transcription of the voir dire exam and of opening and closing statements of the parties when requested by counsel, any party, or the court. The recordation of those parts of a trial was not made mandatory by the rules, and the failure to require recordation cannot be said, ipso facto, to constitute negligence or inadequacy of counsel.
2. **Postconviction: Proof: Appeal and Error.** The appellant in a postconviction proceeding has the burden of alleging and proving that the claimed error is prejudicial.
3. **Juries: Discrimination: Proof.** In order to establish a prima facie case of a violation of the Sixth Amendment right to a jury pool representing a fair cross section of the community, it must be shown (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

4. **Postconviction: Appeal and Error.** A motion for postconviction relief cannot be used to secure review of issues which were known to defendant and could have been litigated on direct appeal.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Affirmed.

Stanley Jones, pro se.

Don Stenberg, Attorney General, and Marilyn B. Hutchinson for appellee.

HASTINGS, C.J., WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ., and BOSLAUGH, J., Retired.

WHITE, J.

In this third appearance before this court, Stanley Jones appeals from a decision of the district court for Douglas County denying postconviction relief.

In the first of the appeals, this court affirmed without opinion Jones' convictions for attempted robbery and use of a firearm to commit a felony and the motion of court-appointed counsel to withdraw on the ground that the appeal was frivolous. *State v. Jones*, 224 Neb. xxv (case No. 86-796, Jan. 23, 1987). At the hearing on the first postconviction petition, the district court ordered a direct appeal reinstated on the holding that the motion and supporting brief of appointed counsel did not conform to *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967).

We note that the U.S. Court of Appeals for the Eighth Circuit approved the reinstated direct appeal remedy ordered by the district court, and we considered all issues which were assigned and argued in the direct appeal. Again we affirmed. *State v. Jones*, 241 Neb. 740, 491 N.W.2d 30 (1992).

Jones assigns as error in this cause that (1) counsel failed to require the reporter to record voir dire of the jury, opening statements, closing arguments, and the rendering of the verdict; (2) the jury did not consist of a fair cross section of the community; and (3) counsel failed to request certain lesser-included instructions. The facts are set out in the previous opinion, see *id.*, and need not be repeated here.

We will deal with the assigned errors in the order set out. Neb.

Ct. R. of Official Ct. Rptrs. 4b(3) and (4) (rev. 1992) requires the transcription of the voir dire exam and of opening and closing statements of the parties when requested by counsel, any party, or the court. The recordation of those parts of a trial was not made mandatory by the rules, and the failure to require recordation cannot be said, ipso facto, to constitute negligence or inadequacy of counsel.

Indeed, the appellant in a postconviction proceeding has the burden of alleging and proving that the claimed error is prejudicial. No error was alleged, and none was established at the postconviction hearing. The assignment is not meritorious. See *State v. Meis*, 233 Neb. 355, 445 N.W.2d 610 (1989), *overruled on other grounds, State v. Stewart*, 242 Neb. 712, 496 N.W.2d 524 (1993).

We consider Jones' next assignment of error. Jones alleges that the jury did not represent a fair cross section of the community, and he was thus denied a fair trial. Jones challenges the jury selection system. Jones is a black male, and the jury consisted of Caucasians. In order to establish a prima facie case of a violation of the Sixth Amendment right to a jury pool representing a fair cross section of the community, Jones must show

> "(1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process."

State v. Perez, 235 Neb. 796, 805, 457 N.W.2d 448, 455 (1990), quoting *Duren v. Missouri*, 439 U.S. 357, 99 S. Ct. 664, 58 L. Ed. 2d 579 (1979). Jones must also show that the State purposefully discriminated against blacks in venire selection in order to establish a prima facie case of a violation of his 14th Amendment right to due process and equal protection. See *Perez, supra.*

Jones fails to meet his burden. He alleges that blacks are underrepresented on juries in Douglas County, but fails to link any alleged underrepresentation to a systematic exclusion of

blacks from the jury selection process as required by *Perez*. Jones also fails to show that the State purposefully discriminated against blacks on his venire or that the State even had the opportunity to discriminate.

Rudy Tesar, clerk of the district court for Douglas County, testified at Jones' postconviction hearing as to the method used to select potential jurors. Tesar testified that potential jurors are randomly selected via computer from voter registration and driver's license lists within Douglas County. No one is excluded from these lists, except those with a physical disability and those over the age of 65, who have the option of being excluded. The election commissioner then summons for jury duty those chosen randomly from that pool of potential jurors. Those who receive a summons congregate at the courthouse to await potential jury duty. A group of randomly chosen potential jurors is then assigned to a courtroom; the size of the group depends on the type of case being tried in that courtroom. Once that group of potential jurors is assigned to a courtroom, their names are mixed in a large cylinder, and a certain number of names is randomly selected for voir dire. Tesar testified that there was no opportunity to exclude any blacks from jury selection. At each step, the group of potential jurors is reduced by random selection. Jones argues that anyone who scans a list of registered voters or a list of those with driver's licenses can tell that minorities, women, the poor, and the oppressed are excluded. This argument is meritless.

Jones cannot satisfy the elements set forth in *Perez*, which are needed to show a prima facie case of a violation of his Sixth Amendment right to an impartial jury, particularly the third element. Jones cannot connect any alleged underrepresentation with systematic exclusion, nor can he satisfy the "purposeful discrimination" requirement necessary to set forth a prima facie case of a violation of his 14th Amendment right to due process and equal protection.

Tesar's testimony fails to reveal a systematic exclusion of blacks from jury duty in Douglas County. This being true, Jones fails to show how being tried by a Caucasian jury denied him a fair trial. The district court found that Jones could not establish a prima facie case with respect to his jury array

challenge, and having found more than adequate support in the record for the district court's finding, we agree.

We next discuss Jones' final assignment of error. Jones contends that the district court abused its discretion when it failed to include attempted assault in the third degree, attempted terroristic threat, attempted theft by unlawful taking, and attempted theft by extortion as lesser-included offenses of attempted armed robbery. Jones failed to raise this issue upon direct appeal to this court. See *State v. Jones*, 241 Neb. 740, 491 N.W.2d 30 (1992). A motion for postconviction relief cannot be used to secure review of issues which were known to defendant and could have been litigated on direct appeal. *State v. Blankenfeld*, 228 Neb. 611, 423 N.W.2d 479 (1988). See, also, *State v. Otey*, 236 Neb. 915, 464 N.W.2d 352 (1991).

Jones was aware of the district court's instructions to the jury on the offenses for which he was charged at the time of his direct appeal to this court. Jones could have raised this issue on direct appeal but did not. We note that Jones had a different attorney on appeal than at the trial level, and Jones does not allege that his appellate attorney was ineffective for failing to raise this issue. The issue is thus barred from consideration by this court.

Upon finding that none of the assignments of error have merit, we affirm the judgment.

AFFIRMED.

RUSSELL J. GAUSMAN, APPELLEE, V. DEPARTMENT OF MOTOR VEHICLES, STATE OF NEBRASKA, APPELLANT.

522 N.W.2d 417

Filed October 7, 1994. No. S-93-392.

1. **Administrative Law: Final Orders: Appeal and Error.** Proceedings for review of a final decision of an administrative agency shall be to the district court, which shall conduct the review without a jury de novo on the record of the agency.

2. _____: _____: _____. In an appeal under the Administrative Procedure Act, the appeal shall be taken in the manner provided by law for appeals in civil cases, and the judgment rendered or final order made by the district court may be reversed, vacated, or modified for errors appearing on the record.
3. _____: _____: _____. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
4. **Administrative Law: Time.** No rule or regulation of any agency shall be valid as against any person until 5 days after such rule or regulation has been filed with the Secretary of State.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Affirmed.

Don Stenberg, Attorney General, and Lauren L. Hill for appellant.

Douglas W. Marolf for appellee.

HASTINGS, C.J., WHITE, CAPORALE, FAHRNBRUCH, and LANPHIER, JJ., and BOSLAUGH, J., Retired.

PER CURIAM.

The director of the Department of Motor Vehicles (department) revoked the driver's license of Russell J. Gausman for 90 days in accordance with the administrative license revocation statutes, Neb. Rev. Stat. §§ 39-669.07 through 39-669.18 (Reissue 1988 & Cum. Supp. 1992). The Lancaster County District Court reversed the director's order and remanded the case to the department with directions that Gausman's license be reinstated immediately. The department appeals. In order to regulate the caseloads of the appellate courts of this state, we removed this case to the Supreme Court.

SCOPE OF REVIEW

Proceedings for review of a final decision of an administrative agency shall be to the district court, which shall conduct the review without a jury de novo on the record of the agency. See, Neb. Rev. Stat. § 84-917(5)(a) (Cum. Supp. 1992); *Lynch v. Nebraska Dept. of Corr. Servs.*, 245 Neb. 603, 514 N.W.2d 310 (1994). In an appeal under the Administrative Procedure Act, the appeal shall be taken in the manner provided by law for appeals in civil cases, and the judgment

rendered or final order made by the district court may be reversed, vacated, or modified for errors appearing on the record. Neb. Rev. Stat. § 84-918(3) (Cum. Supp. 1992); *Lee v. Nebraska State Racing Comm.*, 245 Neb. 564, 513 N.W.2d 874 (1994). When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*

FACTS

On January 29, 1993, Lincoln police officer Douglas Saitta was detailed to the scene of an accident near First Street and Cornhusker Highway in Lincoln. Upon arrival at the scene, Saitta was told by one of the parties to the accident that the other party, Russell J. Gausman, had left the scene of the accident. Saitta pursued Gausman and stopped him at approximately 4:30 p.m.

Saitta observed that Gausman had difficulty retrieving his registration form and had poor manual dexterity and slow, slurred speech. Saitta also noticed a moderate odor of alcohol coming from the vehicle. When Gausman was asked by Saitta to accompany him to the cruiser, Gausman staggered and used the side of his car to balance himself. Gausman was placed under arrest for suspicion of driving while under the influence and was transported to a detoxification center by Officer Gregory Simms. Gausman submitted to a chemical test of his breath, which indicated an alcohol concentration of .215 grams of alcohol per 210 liters of breath.

Pursuant to § 39-669.15, Gausman was given a "Notice/Sworn Report/Temporary License" which stated, inter alia, that there existed reasonable grounds to believe that Gausman had operated a motor vehicle while under the influence of alcoholic liquor and that Gausman was validly arrested pursuant to § 39-669.08. The notice stated that Gausman was advised of the consequences of submitting to and failing a breath test and that the breath test indicated an alcohol concentration of .215.

The notice informed Gausman that his driver's license would

automatically be revoked effective 30 days from the date of the arrest and that if Gausman wished to contest the automatic revocation, he could request a hearing by filing a petition with the department within 10 days. Gausman was required to surrender his driver's license, and a 30-day temporary license was issued.

Gausman timely filed a petition requesting an administrative hearing, which was held on February 18, 1993. At the hearing, Gausman objected to the offer of all evidence on the grounds that the hearing was "not being conducted under any rules certified or promulgated by the Secretary of State, the Attorney General, or the Governor." The department's rules and regulations governing practice and procedure with regard to administrative license revocations which are contested had not been filed with the Secretary of State on the date of Gausman's arrest or the date of the revocation hearing, as required by the Administrative Procedure Act.

Following the hearing, Gausman's license was revoked. The director of the department determined that although § 39-669.15(7) required the adoption and promulgation of rules and regulations to cover the conduct of revocation hearings, the statute did not state the consequence of a failure to have the rules and regulations adopted at the time of the hearing. The director concluded that Gausman was afforded due process because he was provided an opportunity to present evidence and cross-examine the State's witnesses.

On appeal, the district court found that the rules and regulations required by § 39-669.15(7) had neither been approved by the Governor nor filed with the Secretary of State by either January 29, 1993, the date Gausman was arrested, or February 18, the date of the revocation hearing. The court determined that Gausman's right to due process was violated because the rules and regulations used to conduct the revocation hearing had not been approved and filed, as required by Neb. Rev. Stat. § 84-908 (Reissue 1987), at the time of his arrest. The court found that, in some instances, the rules governing the conduct of revocation hearings appeared to be more substantive than procedural in nature. The court reversed the director's order and remanded the case with directions that

Gausman's license be reinstated immediately.

ASSIGNMENTS OF ERROR

The department assigns as error the district court's finding that due process was violated by the department's failure to obtain approval of the rules and regulations governing the conduct of revocation hearings and its failure to have the rules and regulations filed with the Secretary of State on either the date of Gausman's arrest or the date of his revocation hearing. The department also assigns as error the reversal of the revocation order and the reinstatement of Gausman's driver's license.

ANALYSIS

The issue in this case is whether the district court correctly determined that the department's rules and regulations should have been filed with the Secretary of State prior to the revocation hearing at issue. The provisions of § 39-669.15 under which Gausman's license was revoked became effective January 1, 1993. A person who is arrested for driving while under the influence of alcohol and who submits to a chemical test which discloses the presence of alcohol in any of the concentrations specified in § 39-669.07 shall be served verbal notice by the arresting officer, as an agent for the director of the department, of the intention to immediately impound and revoke the driver's license of that person. § 39-669.15(3). The arresting officer shall also serve notice to the arrested person that the revocation will be automatic 30 days after the date of the arrest unless a petition for hearing is filed within 10 days after the date of the arrest. *Id.*

The arresting officer must forward to the director a sworn report stating (1) that the person was validly arrested pursuant to § 39-669.08 and the reasons for the arrest; (2) that the person was requested to submit to the required test; (3) that the person was advised of the consequences if the test disclosed the presence of alcohol in a concentration specified in § 39-669.07, including that the driver's license would be immediately impounded and automatically revoked in 30 days; and (4) that the person submitted to a test, the type of test to which the person submitted, and that the test revealed the presence of

alcohol in a concentration specified in § 39-669.07. § 39-669.15(3).

The arresting officer is required to explain the administrative license revocation procedure and the rights of the arrested person and to provide an addressed envelope and a petition form which may be used to request a hearing before the director to contest the revocation. The petition form must be completed and delivered to the department or postmarked within 10 days after receipt. § 39-669.15(4). The arresting officer is required to take possession of the driver's license and to issue a temporary license which is valid for 30 days. The original license and the sworn report are then forwarded to the director of the department. *Id.*

If a chemical test discloses the presence of alcohol in a concentration of .10 of a gram or more per 100 milliliters of blood or .10 of a gram or more per 210 liters of breath, the issues at the revocation hearing are limited to (1) whether the law enforcement officer had probable cause to believe the person was operating or in actual physical control of a motor vehicle in violation of § 39-669.07 or a city or village ordinance enacted pursuant to § 39-669.07, (2) whether the person was lawfully arrested, (3) whether the person was advised of the consequences if the chemical test disclosed the presence of alcohol in a concentration specified in § 39-669.07, and (4) whether the person was operating or in actual physical control of a motor vehicle while the person had an alcohol concentration in violation of § 39-669.07(1). § 39-669.15(6)(c)(ii)(A) through (D).

If the driver's license is revoked, then "[a]ny person who feels himself or herself aggrieved because of such revocation may appeal therefrom to the district court of the county where the alleged events occurred . . . in accordance with the Administrative Procedure Act." § 39-669.18. The district court conducts the review without a jury de novo on the record of the agency. See, § 84-917(5)(a); *Lynch v. Nebraska Dept. of Corr. Servs.*, 245 Neb. 603, 514 N.W.2d 310 (1994).

Because the appeal of Gausman's license revocation was conducted in accordance with the Administrative Procedure Act, we review the sections of the act which are applicable to the

facts in this case. The director concluded that § 39-669.15(7) required the adoption and promulgation of rules and regulations for the conduct of revocation hearings, but that the law provided no consequences for failure to adopt such rules and regulations. We disagree.

Although § 39-669.15 does not set forth the consequences for failure to adopt and promulgate rules and regulations relating to revocation hearings, the Administrative Procedure Act does provide consequences for failure to adopt such rules and regulations. The act provides that "[n]o rule or regulation of any agency shall be valid as against any person until five days after such rule or regulation has been filed with the Secretary of State." Neb. Rev. Stat. § 84-906 (Reissue 1987). "No adoption . . . of any rule or regulation shall become effective until the same has been approved by the Governor and filed with the Secretary of State after a hearing has been set on such rule or regulation pursuant to section 84-907." § 84-908. Neb. Rev. Stat. § 84-907 (Reissue 1987) requires a public hearing prior to the adoption of such rules. Notice of the hearing must be given to the Secretary of State and published in a newspaper having general circulation in the state.

The department acknowledges that a driver's license is an important interest entitled to the protection of procedural due process. See, *Bell v. Burson*, 402 U.S. 535, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1971); *Stauffer v. Weedlun*, 188 Neb. 105, 195 N.W.2d 218 (1972). The department contends that Gausman was afforded procedural due process because he received a "Notice/Sworn Report/Temporary License" which outlined in detail the operation of administrative license revocation, Gausman's right to request a hearing before the department to contest the revocation, and the four issues which could be disputed at the revocation hearing.

The department argues that Gausman was provided a reasonable opportunity to defend against the charge at his revocation hearing. It contends that notice and opportunity to be heard were afforded Gausman pursuant to the procedures mandated by Neb. Rev. Stat. §§ 84-913 and 84-914 (Reissue 1987) of the Administrative Procedure Act and § 39-669.15. The department claims that together, these statutory

procedures ensured that Gausman's minimum due process rights would be provided throughout the administrative license revocation hearing process.

The department also asserts that a party who is not prejudiced by an agency's failure to adopt comprehensive rules governing the conduct of an administrative hearing is not entitled to a reversal of the agency's decision. It argues that Gausman has neither asserted nor demonstrated that he was prejudiced by any of the regulations contained in 247 Neb. Admin. Code, ch. 1, which were utilized at his revocation hearing and argues that to the extent the rules and regulations were a restatement of the existing principle or mandate, those regulations were not required to be on file with the Secretary of State to be fully effective. We find that these arguments ignore the plain meaning of § 84-906. No rule or regulation is valid until after it has been filed with the Secretary of State.

It is undisputed that the department had not adopted the necessary rules and regulations and had not filed them at the time of Gausman's revocation hearing. Therefore, the department had no valid rules or regulations regarding administrative license revocation hearings in effect at that time.

Although the department claims it complied with procedural due process by affording Gausman timely notice of the hearing, an opportunity to refute or defend against the charge, an opportunity to confront and examine adverse witnesses, and a hearing before an impartial decisionmaker, the department's failure to comply with § 84-906 is a denial of due process. The department held a revocation hearing and proceeded against Gausman using rules and regulations which it had failed to file with the Secretary of State, as required by the Administrative Procedure Act, and which were not valid as against Gausman. Such activity does not comport with due process.

Because we find no error in the determination made by the district court, the judgment is affirmed.

AFFIRMED.

WRIGHT, J., participating on briefs.

KELLY A. ABBOTT, APPELLEE, V. DEPARTMENT OF MOTOR VEHICLES, STATE OF NEBRASKA, APPELLANT.

522 N.W.2d 421

Filed October 7, 1994. No. S-93-393.

1. **Administrative Law: Final Orders: Appeal and Error.** Proceedings for review of a final decision of an administrative agency shall be to the district court, which shall conduct the review without a jury de novo on the record of the agency.
2. _____: _____: _____. In an appeal under the Administrative Procedure Act, the appeal shall be taken in the manner provided by law for appeals in civil cases, and the judgment rendered or final order made by the district court may be reversed, vacated, or modified for errors appearing on the record.
3. _____: _____: _____. When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
4. **Administrative Law: Time.** No rule or regulation of any agency shall be valid as against any person until 5 days after such rule or regulation has been filed with the Secretary of State.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Affirmed.

Don Stenberg, Attorney General, and Mary L. Hewitt for appellant.

Thomas R. Lamb, of Berry, Anderson, Creager & Wittstruck, P.C., for appellee.

HASTINGS, C.J., WHITE, CAPORALE, FAHRNBRUCH, and LANPHIER, JJ., and BOSLAUGH, J., Retired.

PER CURIAM.

The director of the Nebraska Department of Motor Vehicles (department) revoked Kelly A. Abbott's driver's license for 90 days in accordance with the administrative license revocation statutes, Neb. Rev. Stat. §§ 39-669.07 through 39-669.18 (Reissue 1988 & Cum. Supp. 1992). The Lancaster County District Court reversed the director's order and remanded the case to the department with directions that Abbott's license be reinstated immediately. The department appeals; we affirm.

SCOPE OF REVIEW

Proceedings for review of a final decision of an

administrative agency shall be to the district court, which shall conduct the review without a jury de novo on the record of the agency. See, Neb. Rev. Stat. § 84-917(5)(a) (Cum. Supp. 1992); *Lynch v. Nebraska Dept. of Corr. Servs.*, 245 Neb. 603, 514 N.W.2d 310 (1994). In an appeal under the Administrative Procedure Act, the appeal shall be taken in the manner provided by law for appeals in civil cases, and the judgment rendered or final order made by the district court may be reversed, vacated, or modified for errors appearing on the record. Neb. Rev. Stat. § 84-918(3) (Cum. Supp. 1992); *Lee v. Nebraska State Racing Comm.*, 245 Neb. 564, 513 N.W.2d 874 (1994). When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Id.*

FACTS

On January 1, 1993, Abbott was stopped for a traffic violation near 48th and Q Streets in Lincoln. The arresting officer observed that Abbott had glassy eyes and slurred speech and that she smelled of alcohol. Abbott failed field sobriety tests and a preliminary breath test. She was then transported to a detoxification center, where an Intoxilyzer test was administered. The test indicated an alcohol concentration of .174 grams of alcohol per 210 liters of breath.

Pursuant to § 39-669.15, Abbott was given a "Notice/Sworn Report/Temporary License," which indicated she had submitted to a breath test. The notice informed Abbott that her license would automatically be revoked 30 days from the date of the arrest and that if she wished to contest the revocation, she could request a hearing by filing a petition with the department within 10 days. Abbott filed a petition for administrative hearing on January 7, and a notice of hearing dated January 8 notified Abbott that a hearing would be held on January 19.

At the January 19 hearing, Abbott objected to the proceeding in its entirety. Abbott contended the hearing was being conducted using rules and regulations that had not yet been filed with the Secretary of State. The hearing officer

overruled Abbott's objection and received the testimony of the arresting officer. Abbott was allowed to cross-examine the arresting officer and then testified on her own behalf.

The director subsequently issued an order revoking Abbott's driving privileges for 90 days effective January 31, 1993. The order noted that the burden was on Abbott to demonstrate that the administrative revocation should be dismissed and noted that Abbott had argued that the rules and regulations governing the revocation hearing had not been properly promulgated. The director found that the hearing officer's jurisdiction was limited to the issues delineated in § 39-669.15 and stated that "[w]hether rules and regulations were properly adopted is not one of the permissible issues."

Abbott timely appealed the department's decision to the Lancaster County District Court. The court found that the evidence supported a conclusion that the rules and regulations required by § 39-669.15(7) had not been approved by the Governor or filed with the Secretary of State by January 1, 1993, the date Abbott was arrested, or January 19, 1993, the date of the revocation hearing. Further, the court found that Abbott's right to due process had been violated because the rules and regulations used to conduct the revocation hearing had not been approved and filed, as required by Neb. Rev. Stat. § 84-908 (Reissue 1987), at the time of the arrest.

ASSIGNMENTS OF ERROR

The department alleges that the district court erred in (1) finding that Abbott's right to due process was violated by the department's failure to have the regulations governing the conduct of revocation hearings approved and on file with the Secretary of State on the date of Abbott's arrest or the date of the revocation hearing, (2) finding that § 84-908 required that the rules and regulations governing revocation hearings be filed with the Secretary of State on the date of the motorist's arrest, and (3) reversing the director's revocation order and directing reinstatement of Abbott's license.

ANALYSIS

This case raises the same issues as those raised in *Gausman v. Department of Motor Vehicles, ante* p. 677, 522 N.W.2d

417 (1994). Neb. Rev. Stat. § 84-906 (Reissue 1987) provides in part: "No rule or regulation of any agency shall be valid as against any person until five days after such rule or regulation has been filed with the Secretary of State." The department held a revocation hearing and proceeded against Abbott using rules and regulations which had not been filed with the Secretary of State and which were not valid as against Abbott. Such activity does not comport with due process.

Because we find no error in the determination made by the district court, the judgment is affirmed.

AFFIRMED.

WRIGHT, J., participating on briefs.

ROBERT BRODERSEN, APPELLEE, V. TRADERS INSURANCE COMPANY, APPELLANT.

523 N.W.2d 24

Filed October 14, 1994. No. S-93-256.

1. **Insurance: Motor Vehicles.** Neb. Rev. Stat. § 60-509.01 (Reissue 1993) provides the minimum coverage requirements under an uninsured motorist policy.
2. **Insurance: Motor Vehicles: Liability.** Neb. Rev. Stat. § 60-509 (Reissue 1993) defines the minimum limitation of an insurer's liability under an uninsured motorist policy.
3. **Jury Instructions: Appeal and Error.** It is error to give an instruction to a jury after it has retired to deliberate out of the presence of the parties and their counsel, but if it clearly appears that prejudice did not and could not flow therefrom, this is error without prejudice and not ground for reversal.
4. **Insurance: Attorney Fees.** The amount of attorney fees awarded under Neb. Rev. Stat. § 44-359 (Reissue 1993) is a matter within the trial court's discretion.
5. **Attorney Fees.** Attorney fees are costs awarded to prevailing parties; attorney fees are not damages, either compensatory or punitive in nature.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Affirmed.

Thomas M. Locher and Stephen G. Olson II, of Hansen, Engles & Locher, P.C., for appellant.

Lee R. Terry and Warren C. Schrempp for appellee.

HASTINGS, C.J., WHITE, CAPORALE, FAHRNBRUCH, and LANPHIER, JJ., and BOSLAUGH, J., Retired.

WHITE, J.

Robert Brodersen brought suit against defendant, Traders Insurance Company, for damages and injuries he sustained in a collision between the car Brodersen was operating on Ames Street in Omaha and a car following his auto and operated by Thurston S. Temple, who was uninsured. Traders was a named defendant as it had issued an automobile liability policy with underinsured coverage to Brodersen. A jury returned a verdict for Brodersen in the amount of $25,000. Traders appeals. We affirm.

The errors assigned fit into four general categories: (1) Brodersen's failing to introduce the policy of insurance required the dismissal of the petition for failure to prove a prima facie case; (2) the court's allowing the jury to consider life expectancy of Brodersen in assigning damages; (3) the court's giving a supplemental instruction to the jury outside the presence of counsel; and (4) the court's granting an attorney fee.

We will discuss the errors in order. Paragraph 6 of plaintiff's petition states "[t]hat the defendant Traders Insurance Company issued an automobile liability insurance policy to Robert Brodersen which was in effect and valid at the time of the collision. That the Traders Insurance policy issued to Robert Brodersen included uninsured motorist coverage." Traders' answer recites that

> [t]he defendant Traders Insurance Company admits that it issued an automobile liability insurance policy to Robert R. Brodersen, Jr., which was in effect and valid on June 23, 1989. The defendant further alleges that the aforementioned insurance policy issued to Robert R. Brodersen, Jr., included uninsured motorist coverage. The defendant denies the remaining allegations contained in paragraph 6, except those which constitute admissions against the plaintiff's interest.

Neb. Rev. Stat. § 60-509.01 (Reissue 1993) provides in relevant part:

> No policy insuring against loss resulting from liability

> imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance or use of a motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto, in limits for bodily injury or death set forth in section 60-509, under provisions approved by the Director of Insurance, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles and hit-and-run motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom . . . .

Neb. Rev. Stat. § 60-509 (Reissue 1993) defines the minimum limitation of an insurer's liability under an uninsured motorist policy. See *Kracl v. Aetna Cas. & Surety Co.*, 220 Neb. 869, 374 N.W.2d 40 (1985). Section 60-509 provides in relevant part that "[e]very such policy or bond is subject, if the accident has resulted in bodily injury, sickness, disease, or death, to a limit, exclusive of interest and costs, of not less than twenty-five thousand dollars because of bodily injury to or death of one person in any one accident . . . ." Consequently, because Traders failed to plead a policy defense, the Nebraska statutes supply the terms of Traders' policy. The district court properly denied Traders' motion for a directed verdict.

Dr. James P. O'Hara, an orthopedic specialist, testified that Brodersen incurred a permanent impairment of the back as a result of the collision and that the pain resulting therefrom was permanent. Traders fails to point out why an instruction as to life expectancy was not appropriate. The assigned error is patently without merit.

As to the third assigned error,

> "It is error to give an instruction to a jury after it has retired to deliberate out of the presence of the parties and their counsel, but if it clearly appears that prejudice did not and could not flow therefrom, this is error without prejudice and not ground for reversal."

In re Estate of Corbett, 211 Neb. 335, 340, 318 N.W.2d 720, 724 (1982).

The jurors' requests were set forth: "What are the limits on the uninsured motorist policy? Have they (Trader's) [sic] paid on any car, medical, etc. claim regarding Rudy[?] Who has paid the medical bills? How much?" The court's written response was as follows: "You are not entitled to know the limits on the uninsured motorist policy. You are not entitled to know if Traders paid on any claim. The bills were not submitted in evidence, and are not an issue in the case."

Since the trial court merely refused to answer the jury's questions, no prejudice appears, nor has Traders pointed out the damage to its cause, if any. In addition, it appears from the court's notes that the answers to the jury's questions were by agreement of the parties. The correctness of this is not disputed by Traders. The error, if any, was invited, and Traders should not properly raise it. The error assigned has no merit.

Finally, Traders argues that the district court committed reversible error by granting attorney fees under Neb. Rev. Stat. § 44-359 (Reissue 1993) in excess of Traders' contractual obligation. Section 44-359 provides in relevant part:

> In all cases when the beneficiary or other person entitled thereto brings an action upon any type of insurance policy . . . against any company, person, or association doing business in this state, the court, upon rendering judgment against such company, person, or association, shall allow the plaintiff a reasonable sum as an attorney's fee in addition to the amount of his or her recovery, to be taxed as part of the costs. If such cause is appealed, the appellate court shall likewise allow a reasonable sum as an attorney's fee for the appellate proceedings . . . .

The amount of attorney fees awarded under § 44-359 is a matter within the trial court's discretion. *Adams Bank & Trust v. Empire Fire & Marine Ins. Co.*, 244 Neb. 262, 506 N.W.2d 52 (1993). As stated previously, § 60-509 provides that "[e]very such policy or bond is subject, if the accident has resulted in bodily injury, sickness, disease, or death, to a limit, *exclusive of interest and costs*, of not less than twenty-five thousand dollars because of bodily injury to or death of one person in any one accident . . . ." (Emphasis supplied.) Attorney fees are costs

awarded to prevailing parties; attorney fees are not damages, either compensatory or punitive in nature. Indeed, the express language found in § 44-359 provides for a "reasonable . . . attorney's fee *in addition to the amount of* [*the plaintiff's*] *recovery, to be taxed as part of the costs.*" (Emphasis supplied.) Therefore, even if Traders' liability was only $25,000, the statutorily mandated minimum, Traders would nevertheless be liable above that amount for any reasonable amount of interest, costs, and attorney fees. As a result, the district court properly ordered Traders to pay attorney fees to Brodersen's counsel.

We affirm the district court's decision and award Brodersen $3,480 as an attorney fee in this court.

AFFIRMED.

WRIGHT, J., participating on briefs.

FAHRNBRUCH, J., concurs in the result.

STATE OF NEBRASKA, APPELLEE, V. MARTY A. MCDOWELL, APPELLANT.

522 N.W.2d 738

Filed October 14, 1994. No. S-93-1112.

1. **Criminal Law: Motions to Dismiss: Evidence.** In determining whether a criminal defendant's motion to dismiss for insufficient evidence should be sustained, the State is entitled to have all of its relevant evidence accepted as true, the benefit of every inference that reasonably can be drawn from the evidence, and every controverted fact resolved in its favor.
2. **Jurisdiction: Time: Appeal and Error.** Timeliness of an appeal is a jurisdictional necessity and may be raised by an appellate court sua sponte.
3. **Judgments: Time: Appeal and Error.** The time for the appeal of a judgment runs from the date the judgment is rendered.
4. **Criminal Law: Sentences: Judgments: Words and Phrases.** In a criminal case, the judgment is the sentence.
5. **Judgments: Records: Words and Phrases.** The rendition of a judgment is the act of the court, or a judge thereof, in pronouncing judgment, accompanied by the making of a notation on the trial docket, or one made at the direction of the court or judge thereof, of the relief granted or denied in an action.
6. **Judgments: Final Orders: Records.** The mere oral pronouncement of a

judgment without an entry on the trial docket is not the rendition of a judgment or a final order.

7. _____: _____: _____. The issuance of a memorandum opinion or order by a judge without the entry of a notation on the trial docket is not the rendition of a judgment. However, failing a notation on the trial docket, a judgment is rendered when some written notation of the judgment is filed in the records of the court.
8. **Judgments: Records: Jurisdiction: Appeal and Error.** A notice of appeal filed after the trial court announced its decision, but before a judgment has been rendered, is effective to confer jurisdiction on the appellate court if the notice of appeal shows on its face that it relates to the decision which has been announced by the trial court and the record shows that a judgment was subsequently rendered in accordance with the decision which was announced and to which the notice of appeal relates.
9. **Constitutional Law: Rules of the Supreme Court: Statutes: Notice.** Neb. Ct. R. of Prac. 9E (rev. 1992) requires that a party presenting a case involving the federal or state constitutionality of a statute must file and serve a separate written notice thereof with the Supreme Court Clerk at the time of filing such party's brief.
10. **Criminal Law: Proof.** The State must prove beyond a reasonable doubt each and every element of the crime charged.
11. **Burglary: Intent.** A person commits burglary if such person willfully, maliciously, and forcibly breaks and enters any real estate or any improvements erected thereon with intent to commit any felony or with intent to steal property of any value.
12. **Burglary.** Evidence of any act of physical force, however slight, by which the obstruction to entering is removed is sufficient to prove a breaking.
13. _____. Climbing or jumping a fence does not constitute a breaking for the purposes of burglary.

Appeal from the District Court for Platte County: JOHN C. WHITEHEAD, Judge. Reversed and remanded.

Eugene G. Schumacher, of Luckey, Sipple, Hansen, Emerson & Schumacher, for appellant.

Don Stenberg, Attorney General, and Mark D. Starr for appellee.

HASTINGS, C.J., WHITE, CAPORALE, FAHRNBRUCH, and LANPHIER, JJ., and SIEVERS, Chief Judge, and BOSLAUGH, J., Retired.

LANPHIER, J.

After a jury trial in the district court for Platte County, the appellant, Marty A. McDowell, was convicted of burglary,

conspiracy to commit burglary, and theft by unlawful taking. After the verdict, the trial court dismissed the conviction for conspiracy to commit burglary, but let the remaining convictions stand. On appeal, McDowell's assignments of error concern only the conviction for burglary. McDowell contends that the evidence adduced against him was insufficient as a matter of law to sustain a conviction for burglary. McDowell claims, in effect, that the prosecutor charged him with the wrong crime. Although he admits he climbed a fence in order to steal transmission casings from Columbus Transmission, he argues that climbing a fence does not constitute breaking, an essential statutory element of burglary. We agree and, therefore, reverse and remand.

BACKGROUND

During the early morning hours of March 25, 1993, McDowell and Neil Huston were caught stealing transmission casings by Lonny Cattau, one of the owners of Columbus Transmission in Columbus, Nebraska. Cattau woke up around 1 a.m. on March 25 feeling that something was wrong at his transmission shop. He decided to drive down to his shop. As he approached the shop, he noticed a car driving unusually slow past his shop. He followed the car until he saw it go into a trailer court. Cattau then returned to his shop.

After a short while, he saw the car he had followed just north of his parking lot. Cattau observed the driver turn off his headlights and back into a carport located just beyond the chain link fence which constitutes the northern border of the Columbus Transmission storage yard. The storage yard is bordered by the Columbus Transmission building on one side and fence on the other three sides. The storage yard was used to store differentials, transmissions, transmission casings, and other parts.

After the car was parked, Cattau walked out of his shop and over to the carport. When he reached the carport, he saw two individuals, later determined to be McDowell and Huston, loading transmission casings into the backseat of the car located under the carport. Cattau asked McDowell and Huston what they were doing, but received no response. Cattau eventually

took McDowell and Huston back to his office. McDowell told Cattau that he was taking the transmission casings in order to pay off a ticket. McDowell also told Cattau that he jumped the fence to get into the storage yard. Cattau then called law enforcement officers.

At trial, Huston testified that after McDowell parked the car under the carport, McDowell climbed a corrugated steel fence and jumped into the Columbus Transmission storage yard. According to Huston, once inside the yard, McDowell picked up transmission casings and threw them over the fence. Huston then carried the transmission casings into the carport. When a light came on at Columbus Transmission, McDowell and Huston fled in the car. Later, McDowell and Huston drove back to the carport to retrieve the transmission casings. While they were loading the remaining casings, Cattau caught them.

ASSIGNMENTS OF ERROR

McDowell asserts that the trial court erred (1) in failing to grant his motion to dismiss made at the conclusion of the State's case; (2) in failing to hold that the evidence presented was insufficient to support a conviction for burglary; (3) in failing to give a requested instruction concerning the definition of "to break and enter"; (4) in giving instruction No. 8, defining "to break and enter"; (5) in failing to grant his motion for new trial; and (6) in failing to grant his motion to quash, in which he challenged the constitutionality of Neb. Rev. Stat. § 28-507 (Reissue 1989).

STANDARD OF REVIEW

In determining whether a criminal defendant's motion to dismiss for insufficient evidence should be sustained, the State is entitled to have all of its relevant evidence accepted as true, the benefit of every inference that reasonably can be drawn from the evidence, and every controverted fact resolved in its favor. *State v. Carter*, 241 Neb. 645, 489 N.W.2d 846 (1992).

TIMELINESS OF APPEAL

Before addressing the merits of this appeal, we first consider the timeliness of the appeal from the judgment, as there appears to have been an irregularity. Timeliness of an appeal is a

jurisdictional necessity and may be raised by an appellate court sua sponte. See *In re Interest of J.A.*, 244 Neb. 919, 510 N.W.2d 68 (1994).

With respect to the timeliness of an appeal, Neb. Rev. Stat. § 25-1912(1) (Cum. Supp. 1992) provides in pertinent part the following:

> [P]roceedings to obtain a reversal, vacation, or modification of judgments and decrees rendered or final orders made by the district court, including judgments and sentences upon convictions for felonies and misdemeanors, shall be by filing in the office of the clerk of the district court in which such judgment, decree, or final order was rendered, within thirty days after the rendition of such judgment or decree or the making of such final order, a notice of intention to prosecute such appeal . . . .

In order to determine the timeliness of McDowell's appeal from the judgment of the district court, it is necessary to determine the date upon which judgment was rendered. This is necessary because the time for the appeal of a judgment runs from the date the judgment is rendered. *Id.* In a criminal case, the judgment is the sentence. *State v. Spotted Elk*, 227 Neb. 869, 420 N.W.2d 707 (1988); *In re Interest of Wolkow*, 206 Neb. 512, 293 N.W.2d 851 (1980); *State v. Long*, 205 Neb. 252, 286 N.W.2d 772 (1980). The rendition of a judgment is the act of the court, or a judge thereof, in pronouncing judgment, accompanied by the making of a notation on the trial docket, or one made at the direction of the court or judge thereof, of the relief granted or denied in an action. Neb. Rev. Stat. § 25-1301(2) (Reissue 1989). This court has held that the mere oral pronouncement of a judgment without an entry on the trial docket is not the rendition of a judgment or a final order. *Fritch v. Fritch*, 191 Neb. 29, 213 N.W.2d 445 (1973). We have also held that the issuance of a memorandum opinion or order by a judge without the entry of a notation on the trial docket is not the rendition of a judgment. *Valentine Production Credit Assn. v. Spencer Foods, Inc.*, 196 Neb. 119, 241 N.W.2d 541 (1976). However, failing a notation on the trial docket, a judgment is rendered when some written notation of the judgment is filed in

the records of the court. *State v. Foster*, 239 Neb. 598, 476 N.W.2d 923 (1991); *Hoffman v. Reinke Mfg. Co.*, 227 Neb. 66, 416 N.W.2d 216 (1987); *Federal Land Bank v. McElhose*, 222 Neb. 448, 384 N.W.2d 295 (1986); *Schmuecker Bros. Implement v. Sobotka*, 217 Neb. 114, 348 N.W.2d 130 (1984).

The record before us does not contain a copy of the trial docket. It is therefore difficult to determine precisely when judgment was rendered. Notwithstanding the absence of the trial docket, the record demonstrates that McDowell's sentencing hearing took place on December 3, 1993. Since the sentencing could not have taken place prior to that date, neither could the judgment have been rendered. We can therefore conclude that the notice of appeal filed on December 17, 1993, only 14 days after the first date that judgment could have been rendered, was not late.

However, from the record before us it appears that the notice of appeal may have been filed too early. The record shows that a "Sentence and Judgement" signed by the presiding judge was filed December 20, 1993, 3 days after McDowell filed his notice of appeal.

In his praecipe for transcript, McDowell requested that the clerk of the district court prepare a transcript to include, among other items, "[a]ny Journal Entry or Sentence and Judgment which may be filed concerning the sentencing hearing of December 3, 1993." Assuming that the clerk properly performed her task, and we have no reason to believe otherwise, nothing else in the records of the trial court could evidence the rendition of judgment.

There being nothing in the record to establish that the judgment of the district court was noted on the trial docket, the judgment was rendered on December 20, 1993, when the "Sentence and Judgement" was filed in the records of the court. See, *State v. Foster, supra*; *Hoffman v. Reinke Mfg. Co., supra*; *Federal Land Bank v. McElhose, supra*; *Schmuecker Bros. Implement v. Sobotka, supra*. Thus, since the judgment was rendered 3 days after the notice of appeal was filed, the notice of appeal was too early.

However, it is an admittedly odd situation in which the judgment has been announced, but in which an appeal

therefrom cannot be had. Nonetheless a like situation has arisen, albeit in a civil matter, in *Dale Electronics, Inc. v. Federal Ins. Co.*, 203 Neb. 133, 277 N.W.2d 572 (1979). There we held that a notice of appeal filed after the trial court announced its decision, but before a judgment has been rendered, is effective to confer jurisdiction on the appellate court if the notice of appeal shows on its face that it relates to the decision which has been announced by the trial court and the record shows that a judgment was subsequently rendered in accordance with the decision which was announced and to which the notice of appeal relates.

We can see no reason why this rule should not apply in a criminal case in which the same criteria has been met: where there has been an announced decision, a notice of appeal showing on its face that it relates to the announced decision, and the subsequent rendering of a judgment in accordance with the announced decision and to which the notice of appeal relates.

Although the record does not contain a verbatim transcript of the sentencing, a commitment to the Nebraska Penal and Correctional Complex, filed December 9, 1993, serves to establish that the district court announced its decision on December 3, 1993. The record before us also contains a notice of appeal which shows on its face that it relates to the announced decision. Additionally, the record shows that judgment was subsequently rendered in accordance with the announced decision to which the notice of appeal related. Thus, as in *Dale Electronics, Inc.*, the premature notice of appeal was continuing in nature and became effective upon the rendition of judgment. We therefore have jurisdiction over this matter and may proceed to address this appeal on its merits.

CONSTITUTIONALITY

We turn first to McDowell's assertion that § 28-507 is unconstitutionally vague, for if it is, we need not reach McDowell's other assigned errors.

Neb. Ct. R. of Prac. 9E (rev. 1992) requires that "[a] party presenting a case involving the federal or state constitutionality of a statute must file and serve a separate written notice thereof

with the Supreme Court Clerk at the time of filing such party's brief." McDowell acknowledges that he failed to file and serve a separate written notice of his constitutional challenge with the Supreme Court Clerk at the time he filed his brief. He did, however, file the required notice at the time he submitted his reply brief. Nonetheless, since McDowell failed to strictly comply with rule 9E, we will not consider his constitutional challenge to § 28-507. See, *Abdullah v. Gunter*, 242 Neb. 854, 497 N.W.2d 12 (1993); *State v. Melcher*, 240 Neb. 592, 483 N.W.2d 540 (1992); *Givens v. Anchor Packing*, 237 Neb. 565, 466 N.W.2d 771 (1991); *Holdrege Co-op Assn. v. Wilson*, 236 Neb. 541, 463 N.W.2d 312 (1990).

SUFFICIENCY OF THE EVIDENCE

We next address whether the evidence adduced at trial was sufficient to sustain a conviction for burglary, or whether McDowell's motion to dismiss at the close of the State's case should have been sustained. The substance of McDowell's motion to dismiss was that the State failed to prove an element of burglary, a "breaking."

It is fundamental that the State must prove beyond a reasonable doubt each and every element of the crime charged. *State v. Jasper*, 237 Neb. 754, 467 N.W.2d 855 (1991). See, also, *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). The elements of burglary are contained in § 28-507: "A person commits burglary if such person willfully, maliciously, and forcibly breaks and enters any real estate or any improvements erected thereon with intent to commit any felony or with intent to steal property of any value." See, also, *State v. Thomas*, 238 Neb. 4, 468 N.W.2d 607 (1991); *State v. Tyrrell*, 234 Neb. 901, 453 N.W.2d 104 (1990). It is well settled that a breaking is an essential element of burglary. *State v. Crispell*, 201 Neb. 759, 272 N.W.2d 51 (1978); *McGrath v. State*, 25 Neb. 780, 41 N.W. 780 (1889).

On appeal, as in his motion, McDowell contends that the uncontroverted evidence of record is that he climbed a fence to gain entry to the Columbus Transmission storage yard and that climbing a fence is not a breaking. Our review of the record confirms that the only evidence presented was that McDowell

gained entry to Columbus Transmissions' storage yard by climbing a fence. Thus, we must address the question of whether or not climbing or jumping a fence constitutes a "breaking" within the definition of the burglary statute.

We have repeatedly held that evidence of any act of physical force, however slight, by which the obstruction to entering is removed is sufficient to prove a breaking. *State v. Tyrrell, supra*; *State v. Zemunski*, 230 Neb. 613, 433 N.W.2d 170 (1988); *State v. Sutton*, 220 Neb. 128, 368 N.W.2d 492 (1985); *State v. Classen*, 216 Neb. 323, 343 N.W.2d 749 (1984); *State v. Campbell*, 190 Neb. 394, 208 N.W.2d 670 (1973); *Ferguson v. State*, 52 Neb. 432, 72 N.W. 590 (1897); *Metz v. State*, 46 Neb. 547, 65 N.W. 190 (1895). For instance, the opening of a closed door is a breaking. See, *State v. Tyrrell, supra*; *State v. Jones*, 230 Neb. 968, 434 N.W.2d 333 (1989); *State v. Sutton, supra*; *State v. Classen, supra*; *State v. Campbell, supra*; *State v. Sedlacek*, 178 Neb. 322, 133 N.W.2d 380 (1965); *Ferguson v. State, supra*. However, walking through an open door is not. *Hayward v. State*, 97 Neb. 9, 149 N.W. 105 (1914). Opening a skylight is also a breaking, *State v. Zemunski, supra*, yet crawling over a closed door and through an open transom is not, *McGrath v. State, supra*. An analysis of our case law clearly demonstrates that force alone is not enough to constitute a breaking. It takes physical force to walk through an open door or to crawl through an open window, but no obstruction is removed; thus, there is no breaking. Although it undoubtedly took McDowell some measure of force to climb or jump the fence in the instant case, no obstruction was removed. McDowell merely entered through the open space above the fence. Thus, as a matter of law there was no breaking, and therefore no burglary. McDowell's motion to dismiss should have been sustained with respect to the charge of burglary. McDowell's conviction for burglary is therefore, reversed.

JURY INSTRUCTIONS

Although we need not reach McDowell's assigned errors concerning the jury instructions on burglary, since we reversed McDowell's conviction, we note that the trial court did not instruct the jury that breaking requires an obstruction to

entering to have been removed. As discussed above, it is the law of Nebraska that breaking requires both the use of physical force, however slight, and the removal of an obstruction to entering. Also, it is the duty of the trial judge to instruct the jury on the pertinent law of the case, whether requested to do so or not, and an instruction or instructions which by the omission of certain elements has the effect of withdrawing from the jury an essential issue or element in the case is prejudicially erroneous. *State v. Grimes, ante* p. 473, 519 N.W.2d 507 (1994). When burglary is charged, a jury should be instructed that in addition to the use of physical force, however slight, the removal of an obstacle to entry is necessary to find a breaking.

CONCLUSION

Climbing or jumping a fence does not constitute breaking under the definition of the burglary statute, and we therefore reverse McDowell's conviction for burglary. The remaining conviction is not addressed.

REVERSED AND REMANDED.

LAVONNE COASH MALOLEY, APPELLANT, V. SHEARSON LEHMAN HUTTON, INC., AND DANNY KAY DAVIS, APPELLEES.

523 N.W.2d 27

Filed October 21, 1994. No. S-93-189.

1. **Summary Judgment.** On a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists.
2. **Summary Judgment: Appeal and Error.** An appellate court views the evidence in a light most favorable to the party who opposed the motion and gives that party the benefit of all reasonable inferences deducible from the evidence.
3. **Limitations of Actions: Malpractice.** Generally, an action for professional malpractice under Neb. Rev. Stat. § 25-222 (Reissue 1989) must be brought within 2 years.

4. **Limitations of Actions: Fraud: Malpractice.** A single professional relationship will not be separated into various parts for the purpose of applying to one part of that relationship the fraud period of limitations found in Neb. Rev. Stat. § 25-207 (Reissue 1989) and to another part the malpractice period of limitations found in Neb. Rev. Stat. § 25-222 (Reissue 1989).

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Affirmed.

Norman Rifkind and Alan Block, of Beigel & Sandler, and James E. Bachman for appellant.

Terrence D. O'Hara and J. Scott Paul, of McGrath, North, Mullin & Kratz, P.C., and H. Nicholas Berberian and Robert J. Mandel, of Neal Gerber & Eisenberg, for appellees.

HASTINGS, C.J., WHITE, FAHRNBRUCH, and LANPHIER, JJ., and BOSLAUGH, J., Retired.

WHITE, J.

From an order granting summary judgment to defendants, Shearson Lehman Hutton, Inc., and Danny Kay Davis, plaintiff, Lavonne Coash Maloley, appeals.

In October 1983, Maloley, a recent widow, had inherited a substantial estate of about $1.5 million from her deceased husband. Desiring financial advice concerning "conservative, secure investments which would produce future income, preserve her capital and result in beneficial tax consequences," she engaged the services of E.F. Hutton Company Inc. and one of its account advisors, Davis. (In 1988, E.F. Hutton was acquired by defendant Shearson, which was alleged to have assumed all E.F. Hutton's obligations.)

Maloley alleged that she placed special reliance on E.F. Hutton's advertising and was induced to purchase certain limited partnerships. The limited partnerships were not successful, and as a result, Maloley suffered a financial loss of approximately $800,000.

Maloley alleged that Davis and Shearson (1) breached their fiduciary duty, (2) fraudulently misrepresented material facts regarding the investments, and (3) negligently advised her to invest in unsound ventures.

On October 7, 1988, Maloley's counsel informed Davis'

supervisor that the Davis-guided investments were "patently unsuitable." Maloley subsequently filed suit against Shearson and Davis on April 5, 1991. The trial court determined that the suit was barred by the statute of limitations for negligence by professionals. Neb. Rev. Stat. § 25-222 (Reissue 1989). Maloley appeals.

Maloley assigns three errors in this appeal. First, the district court erred in applying § 25-222, the statute of limitations for professional negligence, rather than Neb. Rev. Stat. § 25-207 (Reissue 1989), the residual statute of limitations for tortious conduct, to her breach of fiduciary duty claim. Second, she argues that the district court erred in applying § 25-222 rather than § 25-207 to her negligence claim. Third, she asserts that the district court erred in ruling that, as a matter of law, investors are not permitted to rely on their brokers' statements.

" ' " On a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists." ' " *Healy v. Langdon*, 245 Neb. 1, 3, 511 N.W.2d 498, 500 (1994) (quoting *Quality Equip. Co. v. Transamerica Ins. Co.*, 243 Neb. 786, 502 N.W.2d 488 (1993)). An appellate court views the evidence in a light most favorable to the party who opposed the motion and gives that party the benefit of all reasonable inferences deducible from the evidence. *Healy, supra.*

Section 25-222 provides in relevant part:

> Any action to recover damages based on alleged professional negligence or upon alleged breach of warranty in rendering or failure to render professional services shall be commenced within two years next after the alleged act or omission in rendering or failure to render professional services providing the basis for such action; *Provided*, if the cause of action is not discovered and could not be reasonably discovered within such two-year period, then the action may be commenced within one year from the date of such discovery or from the date of discovery of facts which would reasonably lead to such discovery, whichever is earlier . . . .

The issue therefore is whether Davis was acting in a "professional" capacity to qualify for the shorter limitations

provision in § 25-222.

A "profession" is defined as

> "a calling requiring specialized knowledge and often long and intensive preparation, including instruction in skills and methods as well as in the scientific, historical, or scholarly principles underlying such skills and methods, maintaining by force of organization or concerted opinion high standards of achievement and conduct, and committing its members to continued study and to a kind of work which has for its prime purpose the rendering of a public service."

Lawyers Title Ins. Corp. v. Hoffman, 245 Neb. 507, 512, 513 N.W.2d 521, 524 (1994). Accord, *Georgetowne Ltd. Part. v. Geotechnical Servs.*, 230 Neb. 22, 430 N.W.2d 34 (1988); *Tylle v. Zoucha*, 226 Neb. 476, 412 N.W.2d 438 (1987); Webster's Third New International Dictionary, Unabridged 1811 (1981).

We will consider the errors together. It is conclusive from the record that Maloley contacted E.F. Hutton and Davis for the purpose of soliciting and receiving expert investment advice and that she was aware, at least by October 7, 1988, that the investments were not satisfactory and that the advice was not in accord with her expressed wish. Suit was filed on September 3, 1991, more than 2 years after the date when the statute began to run.

In an attempt to ameliorate the relatively short statute of limitations provided in § 25-222, Maloley asserts various theories relating to Davis' alleged breach of duties that have larger periods of limitation, e.g., § 25-207.

In *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.*, 244 Neb. 408, 421, 507 N.W.2d 275, 283 (1993), we again refused to separate "a single professional relationship into various parts and appl[y] to one part of that relationship the general fraud period of limitations found in § 25-207 and to another part the malpractice period of limitations found in § 25-208."

In *St. Paul Fire & Marine Ins. Co.* we cited, with approval, *Stumpf v. Albracht*, 982 F.2d 275 (8th Cir. 1992), which, relying on *Stacey v. Pantano*, 177 Neb. 694, 131 N.W.2d 163 (1964), held that a claim of fraud against a debtor's former attorney was governed by §§ 25-208 and 25-222. Thus, if Davis was a

professional, the trial court was correct in determining that the period of limitations had run and in granting summary judgment to Davis and Shearson.

In *Educational Service Unit No. 3 v. Mammel, O., S., H. & S., Inc.*, 192 Neb. 431, 222 N.W.2d 125 (1974), this court held that a cause of action against a defendant for negligent planning of a retirement benefit program was controlled by § 25-222. We are unable to distinguish that case from the case at bar. Therefore, the trial court was correct in granting summary judgment to Shearson and Davis and dismissing the petition.

AFFIRMED.

WRIGHT, J., participating on briefs.
CAPORALE, J., not participating.

MAXINE LASCHANZKY, APPELLEE, V. HARRY R. LASCHANZKY, APPELLANT.
523 N.W.2d 29

Filed October 21, 1994. No. S-93-330.

1. **Courts: Jurisdiction: Divorce: Child Support.** A district court, in the exercise of its broad jurisdiction over marriage dissolutions, retains jurisdiction to enforce child support orders, even after the children reach the age of majority.
2. **Courts.** The courts of Nebraska, through their inherent judicial power, have the authority to do all things reasonably necessary for the proper administration of justice, whether any previous form of remedy has been granted or not.
3. **Courts: Jurisdiction.** A court that has jurisdiction to make a decision also has the power to enforce it by making such orders as are necessary to carry its judgment or decree into effect.
4. **Statutes: Judgments: Child Support: Interest.** Prior to the enactment of Neb. Rev. Stat. § 42-358.02 (Reissue 1993), Neb. Rev. Stat. § 45-103 (Reissue 1993) provided for interest on judgments, including child support installments.
5. **Divorce: Equity.** In Nebraska, dissolution of marriage cases are equitable in nature.
6. **Courts: Equity: Judgments: Interest.** Generally, a court of equity has discretion to allow or withhold interest as is reasonable and just. However, a court of equity does not have discretion to allow or withhold interest in cases where interest is recoverable as a matter of right.

7. **Due Process: Property.** A party is not deprived of property without due process of law as long as he has recourse to the courts for the protection of his rights.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Affirmed.

Timothy C. Phillips, of Morrow, Poppe, Otte, Watermeier & Phillips, P.C., for appellant.

Roger J. Heideman for appellee.

HASTINGS, C.J., WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ., and BOSLAUGH, J., Retired.

LANPHIER, J.

This is an appeal from an order of the district court for Lancaster County denying appellant's motion to quash an order to withhold income.

Appellant, Harry R. Laschanzky, and appellee, Maxine Laschanzky, are divorced. Their divorce decree, dated November 10, 1965, required appellant to pay appellee child support of $67.50 per month for each of their three children. Appellant failed to make regular child support payments and owed $21,776, until his income was withheld between approximately September 1986 and November 1989 in order to pay the arrears. The parties' three children were emancipated on June 1, 1971, September 30, 1972, and June 30, 1973.

On August 5, 1992, the Lancaster County Attorney sent a "Notice of Intent to Withhold Income" addressed to appellant at 4642 Calvert Street. The notice stated that it was issued "Pursuant to the Income Withholding for Child Support Act, Nebraska Revised Statutes, Section[s] 43-1701 to 1743." The notice was to inform appellant that his income was to be withheld in order to pay interest of $22,620.42 on the previously past-due child support. The notice further stated that appellant could contest the withholding by requesting a hearing before the Nebraska Department of Social Services within 15 days of the date of the notice. The notice was filed in the district court for Lancaster County on August 7, 1992.

Appellant had previously lived at 4642 Calvert Street, but he did not live there at the time the notice was sent. He had moved to 2408 South 15th Street in June 1990. Thus, appellant never

received the notice. It was not until September 10, 1992, when informed by his employer, that appellant discovered his income was going to be withheld to pay the accrued interest. By this time, the period during which appellant could request a hearing to contest the withholding had passed.

On November 4, 1992, appellant filed a second amended motion to quash the order to withhold income in the district court for Lancaster County, under the case number and title of the original divorce action. In his motion, appellant raised six grounds for quashing the order to withhold income. As restated, appellant contended (1) that the order was issued in violation of appellant's right to due process, (2) that the district court lacked jurisdiction to enforce the collection of that portion of the child support which accrued after the minor children were emancipated, (3) that no child support arrearage existed, (4) that the amount of any arrearage which may exist was wrongly computed by the Lancaster County clerk's office, (5) that appellee was barred by the equitable doctrine of laches from collecting any sum due, and (6) that appellee waived her right to any sum due by her acquiescence during the period of nonpayment.

On November 12, 1992, the district court held a hearing on the motion. On March 15, 1993, the district court overruled appellant's motion. Appellant timely appealed to the Nebraska Court of Appeals. We removed the case to this court under our statutory authority to regulate the caseloads of the appellate courts. Neb. Rev. Stat. § 24-1106 (Cum. Supp. 1992).

ASSIGNMENTS OF ERROR

On appeal, appellant asserts that the trial court erred in (1) failing to find that interest did not accrue on child support payments prior to August 31, 1975, in accordance with Neb. Rev. Stat. § 42-358.02 (Reissue 1993); (2) not applying the doctrine of laches to appellee's failure to claim delinquent child support payments or interest thereon for over 20 years; (3) acting outside the bounds of its jurisdictional limits for the enforcement of a child support order; (4) failing to recognize denial of due process to appellant resulted from lack of proper notice of the intent to withhold his income for the payment of

child support; (5) failing to recognize equitable estoppel as overriding the general rule that a court is without authority to reduce the amount of accrued child support; and (6) failing to recognize that appellee had acquiesced and waived her right to interest by failing to enforce her right to child support payments for over 20 years.

ANALYSIS

We first address appellant's assertion that because the children for whom the child support was ordered were emancipated, the trial court lacked jurisdiction to enforce the child support order; for if the trial court lacked jurisdiction, so do we. See *Scherbak v. Kissler*, 245 Neb. 10, 510 N.W.2d 318 (1994). In support of his claim, appellant relies upon *Meyers v. Meyers*, 222 Neb. 370, 383 N.W.2d 784 (1986), in which we stated that in matters relating to the dissolution of marriages, courts have only such power as is conferred upon them by statute. Then appellant contends that Neb. Rev. Stat. § 42-364 (Reissue 1984) is the sole statutory authority for courts "to deal with children in dissolution actions." Brief for appellant at 13. Finally, appellant argues that § 42-364 limits the courts' authority to issue orders which deal with only minor children.

We recently addressed the identical argument made in a very similar context. In *Zetterman v. Zetterman*, 245 Neb. 255, 512 N.W.2d 622 (1994), we affirmed the decision of a district court to overrule a motion to quash a notice of intent to withhold income for the payment of child support arrearage. There we stated:

> The sole question which we must answer is whether a district court has jurisdiction to enforce child support provisions in a property settlement agreement in a dissolution of marriage case, which provisions are also set out in the court's order, where the child support provisions provide for support, on certain conditions, beyond a child's age of majority.

Id. at 259, 512 N.W.2d at 624.

We held that a district court, in the exercise of its broad jurisdiction over marriage dissolutions, retains jurisdiction to enforce all terms of approved property settlement agreements,

including agreements made to support children of the marriage past the age of majority. In *Zetterman*, the youngest of the children for whom the support was ordered reached the age of majority on January 30, 1988. The notice of intent to withhold income was filed October 18, 1991. The district court's hearing on the motion to quash was held December 6, and the subsequent order overruling the motion was entered on December 27. Implicit in our affirmation of the trial court's order in *Zetterman* is the notion that a child support order can be enforced even after the children reach the age of majority.

Moreover, even if § 42-364 is the only statute permitting the exercise of jurisdiction over the children of parents involved in a dissolution of marriage—a question we do not decide—the courts of Nebraska, through their inherent judicial power, have the authority to do all things reasonably necessary for the proper administration of justice, whether any previous form of remedy has been granted or not. *State v. Joubert, ante* p. 287, 518 N.W.2d 887 (1994). See, also, *Roach v. Roach*, 192 Neb. 268, 220 N.W.2d 27 (1974) (court has inherent power to retain jurisdiction to determine amounts due and to enforce judgments for alimony and child support). A court that has jurisdiction to make a decision also has the power to enforce it by making such orders as are necessary to carry its judgment or decree into effect. *State v. Joubert, supra*, citing *State ex rel. Brubaker v. Pritchard, Judge, etc.*, 236 Ind. 222, 138 N.E.2d 233 (1956); *State ex rel. Watkins v. Land and Timber Company, Limited*, 106 La. 621, 31 So. 172 (1902); *State ex rel. Martin v. Superior Court*, 101 Wash. 81, 172 P. 257 (1918). Thus, although the notice of intent to withhold income was filed after the children had reached the age of majority, the district court had the authority to withhold appellant's income and to entertain the motion to quash. We, therefore, address the remaining assignments of error.

Next, we address appellant's claim that the trial court erred in determining that interest accrued on the delinquent child support payments prior to August 31, 1975, when § 42-358.02 was enacted (§ 42-358.02 actually became effective August 24, 1975). Section 42-358.02 provides in pertinent part that "[a]ll delinquent child support payments shall draw interest at the

rate specified in section 45-103 . . . ." Appellant claims that prior to the enactment of § 42-358.02 there was no provision for charging interest on delinquent child support payments and that § 42-358.02 cannot be applied retroactively.

This claim must also fail. We addressed this issue in *Ferry v. Ferry*, 201 Neb. 595, 271 N.W.2d 450 (1978). There we held that prior to the enactment of § 42-358.02, Neb. Rev. Stat. § 45-103 (1943) provided for interest on judgments, including child support installments. Despite appellant's urging, we decline to reverse our holding in *Ferry*.

In separate assignments of error appellant argues that the district court erred in failing to quash the notice of intent to withhold income based on the doctrines of laches and equitable estoppel. We address these assigned errors together because the same rule of law disposes of them both.

In Nebraska, dissolution of marriage cases are equitable in nature. *Maddux v. Maddux*, 239 Neb. 239, 475 N.W.2d 524 (1991). Generally, a court of equity has discretion to allow or withhold interest as is reasonable and just. *Welch v. Welch, ante* p. 435, 519 N.W.2d 262 (1994); *Kullbom v. Kullbom*, 215 Neb. 148, 337 N.W.2d 731 (1983); *Cumming v. Cumming*, 193 Neb. 601, 228 N.W.2d 296 (1975). However, a court of equity does not have discretion to allow or withhold interest in cases where interest is recoverable as a matter of right. *Id.* As established above, interest on delinquent child support payments is a matter of statutory right. Therefore, the district court did not have discretion to reduce the amount of accrued interest, regardless of the applicability of the doctrines of laches and equitable estoppel.

Finally, appellant claims that since he did not receive notice prior to the time his income was withheld, he was denied due process. He cites no authority in support of his claim. We, however, note that he received a hearing before the district court on the motion to quash the notice of intent to withhold income. The hearing before the district court was not limited to a hearing on jurisdiction, but went to the merits of appellant's claim. We have held that a party is not deprived of property without due process of law as long as he has recourse to the courts for protection of his rights. *Howard v. City of Lincoln*,

243 Neb. 5, 497 N.W.2d 53 (1993); *In re Water Appropriation Nos. 442A, 461, 462, and 485*, 210 Neb. 161, 313 N.W.2d 271 (1981). See *Koepp v. Jensen*, 230 Neb. 489, 432 N.W.2d 237 (1988). Clearly, the hearing provided appellant recourse for the protection of his rights. This claimed error, therefore, is also without merit.

In light of the foregoing, the judgment of the district court is affirmed.

AFFIRMED.

IN RE GUARDIANSHIP AND CONSERVATORSHIP OF JOHNATHAN HARLEY BLOOMQUIST, A PROTECTED PERSON.
CATHERINE M. YAEGER, CONSERVATOR, APPELLANT, V. CITY OF LINCOLN, DOING BUSINESS AS LINCOLN GENERAL HOSPITAL, CREDITOR, APPELLEE.
MICHAEL CENTAMORE, APPELLANT, V. ROBERT COCANOUGHER, APPELLEE, AND AMISUB (SAINT JOSEPH HOSPITAL), INC., INTERVENOR-APPELLEE.
523 N.W.2d 352

Filed October 28, 1994. Nos. S-92-752, S-92-825.

1. **Judgments: Appeal and Error.** Regarding questions of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court.
2. **Statutes: Legislature: Intent.** When asked to interpret a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. In construing a statute, a court must look at the statutory objective to be accomplished, the problem to be remedied, or the purpose to be served, and then place on the statute a reasonable construction which best achieves the purpose of the statute, rather than a construction defeating the statutory purpose.
3. **Appeal and Error.** A case is not authority for any point not necessary to be passed on to decide the case or not specifically raised as an issue addressed by the court.
4. **Attorney Fees: Equity.** The common fund doctrine is founded on the equitable concept that an attorney who performs services in creating a fund should in equity and good conscience be allowed compensation out of the whole fund from all those who seek to benefit from it.

5. **Subrogation: Words and Phrases.** Subrogation involves the substitution of one person in the place of another with reference to a lawful claim, demand, or right, so that he who is substituted succeeds to the rights of the other in relation to the debt or claim and its rights, remedies, or securities.
6. **Liens: Debtors and Creditors: Words and Phrases: Appeal and Error.** A lien is a right afforded by law to have an obligation satisfied out of particular property. A lien is a qualified right of property which a creditor has in or over specific property of his debtor, as security for the debt or charge or for performance of some act.
7. **Subrogation: Equity: Trusts.** A subrogation right is essentially an equitable right to recover and account for a trust fund.

Petitions for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, and IRWIN and MILLER-LERMAN, Judges, on appeal thereto from the District Courts for Lancaster and Douglas Counties, WILLIAM D. BLUE and JOHN E. CLARK, Judges. Case No. S-92-752 on appeal from the County Court for Lancaster County, RICHARD H. WILLIAMS, Judge. Judgment of Court of Appeals reversed, and cause remanded.

Allan J. Eurek, of Pierson, Fitchett, Hunzeker, Blake & Loftis, for appellant Yaeger.

James W. Knowles, Jr., of Knowles Law Office, for appellant Centamore.

Linda W. Rohman and Douglas L. Curry, of Erickson & Sederstrom, P.C., for appellee City of Lincoln.

Neil B. Danberg, Jr., Conal L. Hession, and Matthew G. Dunning, of Kennedy, Holland, DeLacy & Svoboda, for intervenor-appellee.

Roger S. Keetle for amici curiae Nebraska Hospital Association and Nebraska Association of Hospitals and Health Systems.

HASTINGS, C.J., WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ., and BOSLAUGH, J., Retired.

LANPHIER, J.

Nebraska's hospital lien statute, Neb. Rev. Stat. § 52-401 (Reissue 1993), grants medical providers a statutory lien. The lien attaches to any financial recovery that a patient may receive

from a third party in the amount of the reasonable value of medical services necessarily performed. The two cases before us have been consolidated upon appeal. The issue presented in these cases is whether or not a hospital with a perfected lien is obligated to share pro rata in the patient's reasonable costs of recovery from the third party.

Appellants urge that the common fund doctrine applies. The common fund doctrine provides that a plaintiff's attorney, whose efforts create a fund to which others also have a claim, is entitled to recover his fees and costs from the entirety of that fund. Black's Law Dictionary 276 (6th ed. 1990). Appellees argue that the common fund doctrine does not apply because they are creditors, rather than subrogees. As creditors, they are entitled to be paid in any event. Appellees also argue that because there is no contractual relationship between the hospital and the attorney, the hospitals are not obligated to the attorney. Section 52-401 is silent regarding medical providers' liability for attorney expenses. Appellants assert that *West Neb. Gen. Hosp. v. Farmers Ins. Exch.*, 239 Neb. 281, 475 N.W.2d 901 (1991), is dispositive of the issues before this court and requires reversal of the lower courts' decisions. In both of these cases before us, the lower courts held that the medical provider was not obligated to pay a pro rata portion of the patient's attorney fees and costs. The injured parties appealed to the Nebraska Court of Appeals, and that court affirmed the lower courts' judgments in *In re Guardianship & Conservatorship of Bloomquist*, 2 Neb. App. 756, 514 N.W.2d 656 (1994). We granted appellants' petitions for further review.

PROCEDURAL AND FACTUAL BACKGROUND

The facts are stipulated or otherwise undisputed in both cases, and we are presented with a question of law.

The matter of case No. S-92-752 arose from a traffic accident involving Johnathan Harley Bloomquist, a minor child. Bloomquist was struck by a car on September 27, 1989, and sustained a closed head injury. He was taken by ambulance to Lincoln General Hospital (LGH) for emergency medical care.

LGH provided medical services valued at $16,456.15 to Bloomquist as a result of his injuries from the car accident.

Catherine M. Yaeger, Bloomquist's aunt, petitioned for and was appointed his guardian and conservator. The verified petition for appointment of conservator filed with the Lancaster County Court discloses that Bloomquist was indigent and unable to pay any medical bills.

LGH perfected a hospital lien pursuant to § 52-401. The hospital lien, in the amount of $16,456.15, attached to any sum awarded Bloomquist in judgment or obtained by settlement or compromise of any personal injury claim arising out of his accident.

Bloomquist's conservator retained an attorney, Allan Eurek, to prosecute a tort action against the car's driver, Kim Folsom. The conservator consented to a contingent fee agreement pursuant to which Eurek would receive one-third of any amounts recovered on Bloomquist's behalf.

After filing suit and conducting discovery, the conservator was able to achieve a settlement of $100,000. The conservator then applied to have the settlement approved by the county court, as well as her plan to pay medical providers the amounts due them, less their proportionate share of the costs of recovering the settlement.

The parties agree that LGH has a perfected lien, as required by § 52-401, on the settlement proceeds. The parties further agree that the efforts of the conservator's attorney, Eurek, resulted in the settlement of $100,000 and that his requested fee of $33,333, representing 33 1/3 percent of the recovery, plus costs of $815.78, is reasonable. Finally, the parties agreed that if LGH is required to share in attorney fees and expenses, its fair share is $5,619.57.

LGH was given notice of the proceedings in the county court and appeared as an interested party, claiming the full value of the services rendered without any reduction for the costs of litigation. Eurek contended that his services, expended for the benefit of Bloomquist, also benefited LGH and that, therefore, LGH was liable to him for an attorney fee in the amount of one-third of the sum recovered for the benefit of the hospital. The disputed amount, $5,619.57, was paid into court to be distributed upon resolution of the issue of LGH's liability to Eurek, if any.

Following a hearing in the county court for Lancaster County, the parties were permitted to submit briefs regarding the attorney fees issue. By order dated March 3, 1992, the county court ruled that LGH would receive the full amount of its lien without deduction for attorney fees and the other expenses of prosecuting Bloomquist's personal injury claim.

Eurek appealed the county court's ruling to the district court for Lancaster County. The district court affirmed the decision of the county court, and again, Eurek perfected an appeal. In appealing to the Court of Appeals, Eurek took no action to stay the district court's judgment. Consequently, the funds originally paid into court were disbursed to LGH.

The matter of case No. S-92-825 arose when the plaintiff-appellant, Michael Centamore, suffered a partial amputation of his right heel when a power lawnmower ran over his heel. The accident occurred on premises owned by Robert Cocanougher. As a result of his injuries, Centamore was hospitalized at Saint Joseph Hospital, the intervenor herein, from June 2 to 29, 1990, at a cost of $44,016.40.

Centamore retained James W. Knowles, Jr., as counsel to pursue his claim for damages against Cocanougher. Centamore's fee agreement with his attorney was for a contingent fee of one-third, together with out-of-pocket expenses incurred in the prosecution of the action. Centamore filed a negligence action in the Douglas County District Court against Cocanougher.

On September 12, 1990, the Nebraska Department of Social Services (DSS) filed a lien with Knowles for amounts paid by DSS to Saint Joseph Hospital and to various physicians who examined and/or treated Centamore. By the time this matter was tried to a jury, DSS' lien was $8,700.73.

On October 29, 1990, Saint Joseph filed a lien with Cocanougher's insurance carrier, State Farm Insurance Company, for $44,015.40. Subsequent to the filing of the lien, DSS paid $4,332.51 on Saint Joseph's bill, and Saint Joseph amended its lien to $39,683.89.

Centamore's case was tried to a jury, and a $75,000 verdict was returned in Centamore's favor. Pursuant to the fee agreement, Knowles was entitled to an attorney fee of $25,000

and reimbursement of $1,386.13 which represented costs incurred in the handling of the claim. Centamore's counsel asked DSS and Saint Joseph if they would voluntarily reduce their liens by their share of the expenses of recovery.

According to Neb. Rev. Stat. § 68-716 (Reissue 1990), DSS was given the right of subrogation automatically upon Centamore's application for medical assistance benefits. DSS, in the position of a subrogor, accepted counsel's request to reduce its lien. Saint Joseph declined counsel's request to reduce its lien and filed a petition to intervene in this action.

The district court for Douglas County found that Saint Joseph's lien was not subject to reduction in favor of Centamore for a share of the expenses and attorney fees incurred in prosecution of Centamore's tort claim. Centamore properly perfected an appeal to the Nebraska Court of Appeals.

ASSIGNMENT OF ERROR

Appellants assert that the Court of Appeals erred in determining that the hospital lien statute, § 52-401, does not impose liability upon medical providers for a pro rata portion of the costs of a claim or action brought by an injured person to collect damages which results in the satisfaction of a properly perfected lien. Appellants urge that the decision of the Court of Appeals in this matter is contrary to the holding of this court in *West Neb. Gen. Hosp. v. Farmers Ins. Exch.*, 239 Neb. 281, 475 N.W.2d 901 (1991).

STANDARD OF REVIEW

We are presented with questions of law. Regarding questions of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court. *Kopecky v. National Farms, Inc.*, 244 Neb. 846, 510 N.W.2d 41 (1994); *Ehlers v. Perry*, 242 Neb. 208, 494 N.W.2d 325 (1993).

HOSPITAL LIEN STATUTE

The underlying goal of a hospital lien statute is to lessen the burden on hospitals and other medical providers imposed by nonpaying accident cases. Annot., 16 A.L.R. 5th 262 § 2[a] (1993). In Nebraska, as in many other states, medical providers

are granted a lien upon any recovery that the patient might receive from the tort-feasor who caused the patient's injuries. Nebraska's hospital lien statute provides:

> Whenever any person shall employ a physician, nurse, or hospital to perform professional service or services of any nature, in the treatment of or in connection with an injury, and such injured person shall claim damages from the party causing the injury, such physician, nurse, or hospital, as the case may be, shall have a lien upon any sum awarded the injured person in judgment or obtained by settlement or compromise on the amount due for the reasonable value of services necessarily performed, except that no such lien shall be valid against anyone coming under the Nebraska Workers' Compensation Act. In order to prosecute such lien, it shall be necessary for such physician, nurse, or hospital to serve a written notice upon the person or corporation from whom damages are claimed that such physician, nurse, or hospital claims a lien for such services and stating therein the amount due and the nature of such services, except that whenever an action is pending in court for the recovery of such damages, it shall be sufficient to file the notice of such lien in the pending action.

§ 52-401.

We must address whether or not § 52-401 requires medical providers to pay attorney fees to effect recovery from a third party in satisfaction of their lien.

> When asked to interpret a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. In construing a statute, a court must look at the statutory objective to be accomplished, the problem to be remedied, or the purpose to be served, and then place on the statute a reasonable construction which best achieves the purpose of the statute, rather than a construction defeating the statutory purpose.

Durand v. Western Surety Co., 245 Neb. 649, 651, 514 N.W.2d 840, 842 (1994). See, also, *Sarpy County v. City of Springfield*,

241 Neb. 978, 492 N.W.2d 566 (1992).

Liens are supplemental and additional remedies for collection, and therefore, statutes granting liens should be regarded as remedial in nature. *Landis Machine Co. v. Omaha Merchants Transfer Co.*, 142 Neb. 397, 9 N.W.2d 198 (1943). Lien statutes should be construed so as to give full effect to the remedy contemplated by the Legislature. *Id.* See *Senften v. Church of the Nazarene*, 214 Neb. 708, 335 N.W.2d 753 (1983) (stating that mechanic's lien statutes are remedial in nature and require a liberal construction in order to protect all claimants within their scope and to promote substantial justice).

Section 52-401 states that medical providers shall have a lien upon any sum awarded the injured person in judgment or obtained by settlement or compromise on the amount due for the reasonable value of services necessarily performed.

Appellants principally rely upon *West Neb. Gen. Hosp. v. Farmers Ins. Exch.*, 239 Neb. 281, 475 N.W.2d 901 (1991), to support their assertion that § 52-401 allows for the pro rata reduction of a hospital lien for any fees due patient's counsel. In *West Neb. Gen. Hosp.*, we addressed the effect of less than complete compliance with § 52-401's filing and notice requirements on a hospital's ability to enforce its lien. The hospital had failed to perfect its lien with timely, written notice to the tort-feasor or his insurer. We held that an insurer's actual knowledge that the patient had been treated by the hospital was not sufficient to render it liable for settling with the patient without satisfying the lien.

Interpretation of the hospital lien statute was a matter of first impression in *West Neb. Gen. Hosp.* Therefore, we declared that it was "necessary to fully discuss the statute's general scheme in order to resolve the issues involved." 239 Neb. at 283, 475 N.W.2d at 904. In so doing, we stated:

> Under the statute, when the injured party "claim[s] damages from the party causing the injury," the statute gives the hospital "a lien upon any sum awarded the injured person in judgment or obtained by settlement or compromise on the amount due . . . ." § 52-401. Analyzing a similar hospital lien statute, the bankruptcy court for the district of Maryland described such a lien as transferring

> the interest of the injured party in the proceeds of a judgment or settlement to the hospital. *In re Howard*, 43 Bankr. 135 (D. Md. 1983). See, also, *In re Nelson*, 92 Bankr. 837 (D. Minn. 1988) (lien attaches to the patient's preexisting cause of action upon rendition of services by the hospital). When this interpretation is applied to the case at bar, *the lien transferred to West Nebraska [the patient's] interest in sums obtained in judgment or settlement of his claims, up to the value of the services provided by West Nebraska less a reasonable portion of the costs of recovery, including attorney fees. See United Services Automobile Assn. v. Hills, 172 Neb. 128, 109 N.W.2d 174 (1961) (subrogor who accepts proceeds of litigation in which he did not participate must contribute proportional share of expenses, including attorney fees).*

(Emphasis supplied.) 239 Neb. at 285-86, 475 N.W.2d at 905-06.

Appellants argue that the above-emphasized portion of our opinion requires hospital lienholders to share pro rata in the expenses of litigating or settling a personal injury claim. However, the passage, although it recites the longstanding Nebraska common-law rule of the common fund, is dicta and is not controlling regarding the issue before us. "A case is not authority for any point not necessary to be passed on to decide the case or not specifically raised as an issue addressed by the court." *Commerce Sav. Scottsbluff v. F.H. Schafer Elev.*, 231 Neb. 288, 300, 436 N.W.2d 151, 160 (1989). Although we declared that it was "necessary to fully discuss the statute's general scheme in order to resolve the issues involved" in *West Neb. Gen. Hosp.*, we did not specifically address the issue before us in the present cases. No other Nebraska case is controlling on this issue. Legislative history for this statute, enacted in 1927, is lacking. *West Neb. Gen. Hosp., supra.*

Therefore, we address appellants' argument that § 52-401 requires a hospital lienholder to share pro rata in the expenses of litigating or settling a personal injury claim without reference to clearly binding precedent or any legislative intent.

Our starting point of necessity is the plain language of § 52-401. It states that a "physician, nurse, or hospital, as the case may be, shall have a lien upon any sum awarded the injured

person in judgment or obtained by settlement or compromise on the amount due for the reasonable value of services necessarily performed." Generally, cases from other states that examine similar statutes hold that the applicable hospital lien was intended to be effective for its full amount without reduction for any fees due the patient's counsel. *National Ins. v. Parkview Memorial Hosp.*, 590 N.E.2d 1141 (Ind. App. 1992); *Harlow v. Lloyd*, 15 Kan. App. 2d 497, 809 P.2d 1228 (1991); *Bashara v. Baptist Memorial Hosp. System*, 685 S.W.2d 307 (Tex. 1985); *Hillcrest Medical Ctr. v. Fleming*, 643 P.2d 868 (Okla. App. 1982); *Wheaton v. Dept. of Public Aid*, 92 Ill. App. 3d 1084, 416 N.E.2d 780 (1981); *Maynard v. Parker*, 75 Ill. 2d 73, 387 N.E.2d 298 (1979); *Broadlawns, etc., v. Estate of Major*, 271 N.W.2d 714 (Iowa 1978); *Sisters of Charity v. Nichols*, 157 Mont. 106, 483 P.2d 279 (1971).

Despite the apparent consensus, it is difficult to generalize from the above cases due to disparate statutory schemes. For example, in Illinois, the Hospital Lien Act, Ill. Ann. Stat. ch. 770, para. 35 § 0.01 et seq. (Smith-Hurd 1993), grants nonprofit hospitals liens for the amount of their reasonable charges against all claims and causes of actions of the injured person. Ch. 770, para. 35 § 1. However, the amount of the lien cannot exceed one-third of the sum paid or due to the injured person, and any such lien is subordinated to any attorney's lien attached to the same funds. Ch. 770, para. 35 §§ 1 and 5. Alternatively, in Kansas, the hospital lien statute limits the lien to $5,000 and subordinates the hospital lien to any attorney lien. *Harlow, supra.*

Therefore, these cases from other jurisdictions must be referenced with caution. However, as similar arguments were addressed and resolved by those courts, they deserve some consideration.

Appellants argue that the common fund doctrine is applicable in this matter. The common fund doctrine is founded on the "equitable concept that an attorney who performs services in creating a fund should in equity and good conscience be allowed compensation out of the whole fund from all those who seek to benefit from it." *Harlow*, 15 Kan. App. 2d at 500, 809 P.2d at 1231. The application of the common fund doctrine

to the facts before us would not increase the total amount of attorney fees, but would apportion those fees among the patients and the holders of perfected hospital liens.

We first addressed the common fund doctrine in *United Services Automobile Assn. v. Hills*, 172 Neb. 128, 109 N.W.2d 174 (1961). In *Hills*, a car accident victim had retained Hills, an attorney, to represent him in an action against the driver of the other car. The client's own insurer, United, had paid him $454.93 for the property damage to his automobile. Attorney Hills informed United of his intent to sue and offered to handle the insurer's subrogation claim. Hills received no response. Hills negotiated a settlement with the tort-feasor's insurer, Allstate, in the amount of $3,500. When the $3,500 was ready for payment, Hills requested Allstate to issue two drafts: one in the amount of $454.93 payable to United and Hills, and one for $3,045.07 payable to the client and Hills. United commenced a declaratory judgment proceeding against Hills and Allstate and presented this court with an issue regarding the interest of Hills, if any, in the draft for $454.93. Allstate alleged it had no interest in the litigation, asserted that it was a stakeholder, paid the disputed amount into court, and was dismissed from the case.

In *Hills*, we stated,

> The applicable rule is that where the holder of the subrogation right [United] does not come into the action, whether he refuses to do so or acquiesces in the plaintiff's action, but accepts the avails of the litigation, he should be subjected to his proportionate share of the expenses thereof, including attorney's fees.

172 Neb. at 133, 109 N.W.2d at 177. The rationale for this rule was stated as follows:

> Ordinarily the right of a lawyer to compensation for his services depends upon a contract of employment, express or implied. But there are exceptions to this general rule. One exception is stated in a well-known text as follows: "An attorney who renders services in recovering or preserving a fund, in which a number of persons are interested, may in equity be allowed his compensation out of the whole fund, only where his services are rendered on behalf of, and are a benefit to, the common fund."

7 C. J. S., Attorney and Client, § 193 b (2), p. 1098.
172 Neb. at 132, 109 N.W.2d at 177.

As appellees argue, most courts which have considered the issue have concluded that the common fund doctrine does not apply in hospital lien cases. See, *Harlow v. Lloyd*, 15 Kan. App. 2d 497, 809 P.2d 1228 (1991); *Bashara v. Baptist Memorial Hosp. System*, 685 S.W.2d 307 (Tex. 1985); *Hillcrest Medical Ctr. v. Fleming*, 643 P.2d 868 (Okla. App. 1982); *Maynard v. Parker*, 75 Ill. 2d 73, 387 N.E.2d 298 (1979); *Broadlawns, etc., v. Estate of Major*, 271 N.W.2d 714 (Iowa 1978). These courts, as did the Nebraska Court of Appeals, generally come to that conclusion by determining that medical providers do not hold subrogation interests; rather, they are the creditors of the injured parties.

Subrogation involves

> [t]he substitution of one person in the place of another with reference to a lawful claim, demand or right, so that he who is substituted succeeds to the rights of the other in relation to the debt or claim, and its rights, remedies, or securities. . . . Insurance companies, guarantors and bonding companies generally have the right to step into the shoes of the party whom they compensate . . . .

Black's Law Dictionary 1427 (6th ed. 1990).

"A lien is 'a right afforded by law to have an obligation satisfied out of particular property.' " *Ehlers v. Perry*, 242 Neb. 208, 217, 494 N.W.2d 325, 332 (1993) (quoting *Dupuy v. Western State Bank*, 221 Neb. 230, 375 N.W.2d 909 (1985)). A lien is a "[q]ualified right of property which a creditor has in or over specific property of his debtor, as security for the debt or charge or for performance of some act." Black's Law Dictionary, *supra* at 922.

In *Maynard, supra*, the Illinois court declared that the relationship between the patient and the hospital was a debtor-creditor relationship. The patient's liability to the hospital was not dependent upon the creation of a fund; rather, the patient was obligated to pay for medical services rendered out of any resources that might become available.

The Iowa court in *Broadlawns, etc., supra*, rejected the applicability of the common fund doctrine in hospital lien cases

for the reason that hospitals and patients do not stand on equal bases as claimants against the fund. The hospital was merely a creditor.

The Kansas court distinguished cases involving subrogation interests from hospital lien cases in order to reach a similar conclusion. *Harlow, supra.* A subrogated insurer has coextensive rights and liabilities with its insured in comparison to the debtor-creditor relationship between a patient and a hospital. The court concluded that "when there are sufficient funds to satisfy attorney fees and a hospital lien . . . attorney fees cannot be deducted from the hospital lien." 15 Kan. App. 2d at 501, 809 P.2d at 1232.

In *Sisters of Charity v. Nichols*, 157 Mont. 106, 483 P.2d 279 (1971), the Montana court found the analogy between subrogated insurers and hospital lien cases inapt.

> [T]he hospital's claim and lien is based upon a debt owed the hospital by its patient in whose shoes it does not stand for any purpose, the debt being owed to it by its patient irrespective of the patient's rights against a third party wrongdoer. Because the substitution principle does not apply here, no obligation arises on the part of the hospital to share in the costs of recovery against a third party, and the attempted analogy fails.

Id. at 112-13, 483 P.2d at 283.

The Nebraska Court of Appeals agreed with the foregoing authorities. In *In re Guardianship & Conservatorship of Bloomquist*, 2 Neb. App. 756, 764, 514 N.W.2d 656, 660-61 (1994), the court stated that "[t]he hospitals have provided services to injured parties for which they have charged them. The hospitals have not paid a debt for Centamore or Bloomquist and thus cannot be said to be subrogors." Given that the hospitals were not subrogors, the Court of Appeals concluded that the common fund doctrine could not apply.

It is true that the common fund doctrine generally applies in situations presenting a subrogation interest and that under Nebraska law, the hospital's interest in the patient's recovery fund is clearly that of a lienholder. See, *Ehlers, supra*; *West Neb. Gen. Hosp. v. Farmers Exch. Ins.*, 239 Neb. 281, 475 N.W.2d 901 (1991). However, the ultimate question is not

whether the hospitals are lienholders or subrogors, but whether the hospitals have been so benefited by the patients' attorneys who rendered services in obtaining settlements that the attorneys should in equity be allowed their compensation out of the whole fund. By examining this ultimate issue, one court has recently concluded that the common fund doctrine does apply in hospital lien cases. *Martinez v. St. Joseph Healthcare System*, 117 N.M. 357, 871 P.2d 1363 (1994).

In *Martinez*, the New Mexico Supreme Court stated:

> We believe that in hospital lien cases the "common-fund" doctrine most appropriately defines the duties and liabilities of the parties and provides the most fundamental fairness. Under this doctrine, an attorney who creates a pool of funds for a group has the right to seek payment from the pool or seek proportional contribution from those who accept the benefits of the attorney's efforts. . . . In hospital lien cases, the hospital's right to assert a lien, and its right to recovery based on that lien, depend *by statute* on the obtaining of a judgment or settlement. . . . The proceeds of that judgment or settlement operate as a fund, and, without the fund, the hospital has nothing upon which to assert a lien under the Act. By seeking payment from the fund in reliance on the lien, the hospital directly receives the benefits of the work done by the patient's attorney. . . . Because of this, it would be fundamentally unfair to allow the Hospital to collect on its lien without paying its prorated share of the legal expenses.

871 P.2d at 1366-67.

Appellees attempt to limit the application of the common fund doctrine as stated in *United Services Automobile Assn. v. Hills*, 172 Neb. 128, 109 N.W.2d 174 (1961), by distinguishing between a statutory lien interest and a subrogation interest. Appellees argue that, unlike subrogated insurers, hospital lienholders have no interest in the injured patient's cause of action against the third party tort-feasor. Hospital lienholders have no standing to participate in the injured patient's personal injury action, and they have no separate cause of action against the tort-feasor or the tort-feasor's insurer.

Appellees argue that the hospitals have a lien for the full amount of their bill and are only "incidentally" benefited by the expenditure of costs by the patients and the effort of the patients' attorneys. This argument overlooks the fact that the claim against a penniless person is not in reality or accounting practice worth its full value. A lien on such a personal injury claim is worthless unless and until through the expenditure of funds and effort by the attorney the claim is successfully asserted to completion. The policy underlying the common fund doctrine (to avoid unfairness) exists in both a subrogation situation and in a hospital lien situation where the hospital is a creditor with a lien and the patient has no funds to pay. In both situations, the claim or lien will only be paid if the injured party incurs the cost to effectuate a settlement or judgment.

A subrogation right is essentially an equitable right to recover and account for a trust fund. *Krause v. State Farm Mut. Auto. Ins. Co.*, 184 Neb. 588, 169 N.W.2d 601 (1969), *modified* 184 Neb. 638, 170 N.W.2d 882. Where the insured, having sustained a loss in excess of the amount he received from his insurance company, obtains compensation from the wrongdoer, the insured then holds the funds in trust for the insurance company. *Id.* The underlying rationale is unjust enrichment.

In the cases before us, indigent patients received medical services which they were unable to pay for. But for the efforts of the patients' attorneys and the incurring of costs by the patients, it is unlikely that the hospitals would receive any payment. The lien statute grants hospitals a method of obtaining a full or partial recovery for the value of services that the hospitals would probably have "written off" as uncollectible; and while not a windfall to the hospitals, the recovery should not come without costs. In some circumstances, an injured party may lack any incentive to pursue litigation because his medical expenses equal or exceed the limits of insurance or other assets available to satisfy a judgment from a third party. Any recovery such a party would receive would be exhausted by attorney fees and medical expenses.

Medical providers who rely on the hospital lien statute to

recover their costs only receive payment if the injured person incurs the cost of hiring an attorney to effectuate a recovery. If the injured person elects not to prosecute a claim, then the lien itself is worthless. The hospital may not stand in the patient's shoes, but the hospital is entirely dependent upon the patient's attorney.

CONCLUSION

As was recently decided by the New Mexico Supreme Court, we hold that hospitals are liable for their pro rata portion of the legal expenses and costs where they seek payment out of a judgment or settlement for the amount of a lien filed pursuant to § 52-401.

REVERSED AND REMANDED.

SUNRISE COUNTRY MANOR, FORMERLY KNOWN AS MILFORD REST HOME, APPELLEE, V. NEBRASKA DEPARTMENT OF SOCIAL SERVICES, APPELLANT.

523 N.W.2d 499

Filed October 28, 1994. No. S-93-118.

1. **Administrative Law: Pleadings: Appeal and Error.** When a petition instituting review pursuant to the Administrative Procedure Act is filed in the district court, the review by the district court is de novo on the record.
2. **Administrative Law: Judgments: Final Orders: Appeal and Error.** The judgment rendered or final order made by the district court in an Administrative Procedure Act appeal may be reversed, vacated, or modified by the Supreme Court or the Court of Appeals for errors appearing on the record.
3. **Administrative Law: Judgments: Appeal and Error.** When reviewing a judgment for errors appearing on the record in an Administrative Procedure Act appeal, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.
4. **Administrative Law: Proof.** A long-term care facility seeking reimbursement from the Department of Social Services pursuant to state medicaid regulations has the burden to prove its entitlement thereto.
5. **Administrative Law: Proof: Appeal and Error.** An incorrect statement of the burden of proof is not reversible error per se, if a district court's decision in an Administrative Procedure Act appeal otherwise conforms to the law, is

supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.

6. **Administrative Law: Judicial Notice: Proof: Appeal and Error.** Generally, the appellate courts of this state will not take judicial notice of administrative rules or regulations. It is incumbent upon the party relying on an administrative rule or regulation to prove both its existence and its language.
7. **Appeal and Error.** Cases are heard in the state appellate courts on the theory upon which they were tried.
8. **Administrative Law: Appeal and Error.** Ordinarily, deference is accorded to an agency's interpretation of its own regulations unless plainly erroneous or inconsistent.
9. **Administrative Law.** Agency regulations, properly adopted and filed with the Secretary of State of Nebraska, have the effect of statutory law.
10. **Administrative Law: Statutes: Appeal and Error.** The meaning of a statute is a question of law, and a reviewing court is obligated to reach its conclusions independent of the determination made by the administrative agency.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Reversed and remanded with direction.

Don Stenberg, Attorney General, and Royce N. Harper for appellant.

Robert L. Lepp and Mark A. Pieper, of McGill, Gotsdiner, Workman & Lepp, P.C., for appellee.

HASTINGS, C.J., WHITE, CAPORALE, and FAHRNBRUCH, JJ., and BOSLAUGH, J., Retired.

FAHRNBRUCH, J.

The Nebraska Department of Social Services (Department) appeals a decision of the district court reversing an order of the Department's director which disallowed an interest expense claimed by Sunrise Country Manor (Sunrise), a nursing home facility.

We reverse the order of the district court for Lancaster County and remand the cause with direction to reinstate the director's order.

STANDARD OF REVIEW

The Department, as an administrative agency of the State of Nebraska, has appealed pursuant to the Administrative Procedure Act (APA), Neb. Rev. Stat. § 84-901 et seq. (Reissue

1987 & Cum. Supp. 1992).

When a petition instituting review pursuant to the APA is filed in the district court, the review by the district court is de novo on the record. § 84-917(5)(a); *Crawford v. Department of Motor Vehicles, ante* p. 319, 518 N.W.2d 148 (1994).

The judgment rendered or final order made by the district court in an APA appeal may be reversed, vacated, or modified by the Supreme Court or the Court of Appeals for errors appearing on the record. § 84-918(3); *James v. Harvey, ante* p. 329, 518 N.W.2d 150 (1994); *Crawford v. Department of Motor Vehicles, supra.* When reviewing a judgment for errors appearing on the record in an APA appeal, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable. *Crawford v. Department of Motor Vehicles, supra.*

FACTS

Review of this case is hampered because many of the parties' citations to the record in their briefs are insufficient to verify the facts as stated, and to that extent the briefs do not comply with our rules. See Neb. Ct. R. of Prac. 9D(1)f (rev. 1992) (stating that "every recitation of fact . . . shall be annotated to the record . . . ."). Furthermore, the parties presented little or no testimony at the hearing as to many of the exhibits entered into evidence, even though a number of those exhibits were accounting and auditing records which were at least somewhat technical in nature. As best we can determine from the record before us, the facts of this case are as follows:

Sunrise, formerly known as Milford Rest Home, is a 72-bed nursing home facility located in Milford. The facility serves many older and "heavier care" patients, including a very high "mix" of medicaid patients, and has entered into a "Medical Assistance Long Term Care Provider Agreement" with the Department.

As a provider of medicare long-term care services, Sunrise is entitled to apply for reimbursement of certain expenses. See 471 Neb. Admin. Code, ch. 12, § 011. To receive such reimbursement, Sunrise is required to submit its costs by filing a

periodic report to the Department. See 471 Neb. Admin. Code, ch. 12, § 011.09. It is certain changes in the reimbursement regulations which have given rise to this case.

Until June or July 1983, Meriel M. Stauffer was president of Sunrise and owned 90 percent of the stock. Her son, Lemar Tim Stauffer, also known as Tim Stauffer, owned the remaining 10 percent of the stock. Previous to 1983, Sunrise had been reimbursed by medicaid for return on equity to Meriel Stauffer. However, the January 1, 1984, revision of the regulations eliminated return on equity paid to stockholders or partners as a reimbursable cost. See 471 Neb. Admin. Code, ch. 12, § 011.05 (rev. Jan. 1, 1984).

In June or July 1983, Tim Stauffer purchased the nursing home facility from his mother. At the same time, Milford Rest Home and Meriel Stauffer, personally, borrowed $100,000 from Farmers and Merchants Bank (Bank), as evidenced by a demand note in that amount dated June 10, 1983. The purpose of the loan was stated on the face of the note to be "[p]ayment of Milford REst [sic] Home, Inc.[,] indebtedness to Meriel M. Stauffer." The note was signed by Meriel Stauffer in her personal capacity, and on behalf of Milford Rest Home by Meriel Stauffer as president and Tim Stauffer as secretary-treasurer.

The note was secured by a deed of trust on certain real estate, executed by Meriel Stauffer in her personal capacity, and by a $35,000 certificate of deposit. A loan guarantee agreement in favor of the Bank is also in the record. That document contains the typewritten names of Meriel Stauffer, Tim Stauffer, and one Connie Lou Stauffer. However, there are no signatures on the document.

After a routine audit of Sunrise's claimed expenses for the reporting period ending June 30, 1987, the Department disallowed Sunrise reimbursement for interest on the loan from the Bank. The auditor made the following note in his workpapers:

> [Tim Stauffer] informed this auditor that the $100,000 was basically invested capital due his mother that had been retained in the business. Since the intent in establishing the note payable to Meriel was to record the invested funds

> due her, the interest cost from the Farmers and Merchants Bank is disallowed. Per HIM 15 218.1, interest cost paid by the facility to a stockholder is not an allowable cost. Since the Farmers and Merchants Bank loan merely replaces the original note, the interest cost is not allowed.

An auditor for the Department testified at the hearing that because the adjustment was material, i.e., it had more than a $1,000 medicaid impact, the Department opened up and audited the reports for 1984-86. Through a series of field audits for the periods ending June 30, 1984, through June 30, 1987, and desk audits for the periods ending June 30, 1988, through June 30, 1990, the Department ultimately made adjustments to Sunrise's long-term care cost reports for the years 1984-90. Sunrise's interest expense on the loan from the Bank was denied for each of those years, and the Department also made other adjustments which are not before the court at this time.

Sunrise appealed the adjustment of interest expense, as well as other adjustments, and after a hearing, the director of the Department affirmed the adjustments. Sunrise appealed to the district court, which held that some of the director's adjustments were proper, but reversed the director's decision regarding the interest expense.

The Department timely appealed to the Nebraska Court of Appeals, contesting the part of the district court's order permitting reimbursement for the interest expense. Sunrise filed no cross-appeal. The case was removed from the Court of Appeals to this court pursuant to our authority to regulate the caseloads of the appellate courts of this state.

ASSIGNMENTS OF ERROR

The Department contends that the district court erred in (1) placing the burden of proof for reimbursement on the Department; (2) finding that the original loan, i.e., Meriel Stauffer's equity interest, was necessary and proper, which finding was contrary to the law and regulations governing provider reimbursement and contrary to the evidence; and (3) failing to give due deference to the Department's interpretation of its rules and regulations and to the expertise of the agency director.

ANALYSIS

BURDEN OF PROOF

The district court, in its order, stated that "[t]here was *no evidence presented* which established that the original loan *was not necessary and proper* . . . ." (Emphasis supplied.) The Department contends that this statement is evidence that the district court erroneously shifted the burden of proof to the Department by requiring the Department to show that Meriel Stauffer's original loan to Sunrise *was not* necessary and proper, rather than requiring Sunrise to show that the loan *was* necessary and proper.

We agree that a long-term care facility seeking reimbursement from the Department of Social Services pursuant to state medicaid regulations has the burden to prove its entitlement thereto. This is consistent with our holdings in appeals of other administrative agency decisions.

For example, we have previously held, in appeals involving individual applicants for public assistance benefits, that one seeking public assistance has the burden of proving entitlement thereto. See, *Meier v. State*, 227 Neb. 376, 417 N.W.2d 771 (1988); *Dobrovolny v. Dunning*, 221 Neb. 67, 375 N.W.2d 123 (1985).

We have also held that an applicant for a certificate of public convenience as a common carrier has the burden of proof at a hearing before the Nebraska State Railway Commission to show that the conditions for granting such an application have been met. See, *In re Application of Canada*, 154 Neb. 256, 47 N.W.2d 507 (1951); *In re Application of Moritz*, 153 Neb. 206, 43 N.W.2d 603 (1950).

Sunrise does not dispute that it bears the burden of proof, but argues that the district court's statement is merely a finding that, after Sunrise had met its burden to show that the original loan was necessary and proper, the Department had failed to come forward with evidence to the contrary.

Sunrise would have us infer too much from the district court's order, which reflects no finding whatever that Sunrise had presented evidence that either the original loan or the replacement loan was necessary and proper. It is clear that the

district court erroneously stated the burden of proof. Nonetheless, an incorrect statement of the burden of proof is not reversible error per se, if a district court's decision in an APA appeal otherwise conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable.

NECESSARY AND PROPER REQUIREMENTS

The remaining assignments of error present the issue of whether the district court erred in finding that, under Department regulations, Sunrise was entitled to medicare reimbursement for interest on a loan which was used to pay off the equity interest of an owner. This requires that we initially determine which regulations are properly before the court.

Generally, the appellate courts of this state will not take judicial notice of administrative rules or regulations. See *Donahoo v. Nebraska Liquor Control Comm.*, 229 Neb. 197, 426 N.W.2d 250 (1988). It is incumbent upon the party relying on an administrative rule or regulation to prove both its existence and its language. *Id.*

At the beginning of the administrative hearing, both parties entered into evidence various versions of the regulations at issue. One set of selected state administrative regulations was entered into evidence by each party. All regulations have printed headings identifying the source as either "Nebraska DPW Program Manual" or "Nebraska Department of Social Services Manual." All have printed revision dates in the headings, and some have handwritten notations by an unknown scrivener identifying the inclusive dates for which the particular regulations were in effect. The two sets of state administrative regulations, although organized differently in the parties' exhibits, appear to be substantially the same.

Two versions of the medicaid regulations were also entered into evidence. The version entered by Sunrise as exhibits 8D, 8E, and 8F is hand-labeled "HIM." The bottom of each page contains the printed words "Medicare and Medicaid Guide," but the ultimate source of these regulations is unknown. Although the content of the regulations appears to be related to the issues in this case, neither the testimony nor the briefs refer

to any of the regulations by the section numbers contained in those exhibits.

The regulations entered into evidence by the Department as exhibit 52 are also hand-labeled "HIM." The source of exhibit 52 is likewise undisclosed. Exhibit 52 appears to contain regulations similar to those in exhibits 8D, 8E, and 8F, but the exhibits are by no means identical, and the regulations in exhibit 52 have a different numbering system than the ones in exhibits 8D, 8E, and 8F. The testimony and the briefs refer to the regulation numbers contained in exhibit 52.

Because the origins of exhibits 8D, 8E, 8F, and 52 are undisclosed, the parties have failed to prove the existence of those particular regulations. However, cases are heard in the state appellate courts on the theory upon which they were tried in the lower courts. See *Donahoo, supra* (stating that the Supreme Court would proceed on the basis that the regulation in question paralleled a state statute, even though the regulation was not a part of the record, because both parties had proceeded on that assumption).

Because the parties both apparently relied on exhibit 52 by citing to regulation numbers contained therein, and apparently agree that exhibit 52 contains selected medicaid regulations, we will consider exhibit 52 to be the applicable medicaid regulations for purposes of our analysis. We will disregard the purported medicaid regulations contained in exhibits 8D, 8E, and 8F. We now turn to the content of the applicable regulations.

Allowable costs for reimbursement of Nebraska nursing care facilities for all of the time periods in question are governed by 471 Neb. Admin. Code, ch. 12, § 011.04 (rev. July 24, 1990; July 15, 1987; Dec. 1, 1984; Jan. 1, 1984; and Nov. 24, 1982).

Costs which are specifically unallowable are enumerated in 471 Neb. Admin. Code, ch. 12, § 011.05 (rev. July 24, 1990; July 15, 1987; Dec. 1, 1984; Jan. 1, 1984; and Nov. 24, 1982). Return on equity was first listed as an unallowable cost in the January 1, 1984, revision of § 011.05(12).

Additionally, the principles of reimbursement for provider's cost and the related policies under which the medicare extended-care facility functions, contained in medicare's

"*Provider Reimbursement Manual* (HIM-15)," are used to determine the cost for Nebraska nursing care facilities, with certain exceptions, and are incorporated by reference in 471 Neb. Admin. Code, ch. 12, § 011.03 (rev. July 24, 1990; July 15, 1987; Dec. 1, 1984; Jan. 1, 1984; and Nov. 24, 1982).

Reimbursement of interest expense is specifically provided for in the HIM regulations. Section 202.1 states in part:

> To be allowable under the Medicare program, interest must be: (1) supported by evidence of an agreement that funds were borrowed and that payment of interest and repayment of the funds are required; (2) identifiable in the provider's accounting records; (3) related to the reporting period in which the costs are incurred; and (4) necessary and proper for the operation, maintenance, or acquisition of the provider's facilities.

The Department does not challenge whether the replacement loan meets the first three requirements for payment of interest cost under § 202.1. Rather, the Department claims that Sunrise has not shown either the original loan from Meriel Stauffer or the replacement loan to be necessary and proper, the fourth requirement of § 202.1.

The HIM regulations define "necessary" and "proper." "Necessary means that the interest be incurred on a loan made to satisfy a financial need of the provider and for a purpose reasonably related to patient care." HIM § 202.2.

> Proper means that the interest be incurred at a rate not in excess of what a prudent borrower would have had to pay in an arm's-length transaction in the money market when the loan was made. In addition, the interest must be paid to a lender not related to the provider through common ownership or control.

HIM § 202.3.

The parties disagree as to whether the replacement loan was necessary. As to whether the replacement loan was proper, it is undisputed that the loan was an arm's-length transaction between unrelated entities. The dispute is simply whether interest on a replacement loan which otherwise meets the requirements of § 202.1 is reimbursable if interest on the original loan was not reimbursable. The record fails to reflect a

regulation that explicitly states that interest on a replacement loan such as the one at issue in this case is either allowable or unallowable.

Under the facts of this case, whether interest expense is allowable pursuant to HIM § 202.1 poses questions of both fact and law. Whether interest on the replacement loan is *necessary* presents a question of fact. Whether interest on the replacement loan is *proper*, on the other hand, presents a question of law.

We first inquire whether the district court's decision conforms to the law, that is, whether the replacement loan is proper. Ordinarily, deference is accorded to an agency's interpretation of its own regulations unless plainly erroneous or inconsistent. *In re Application of Jantzen*, 245 Neb. 81, 511 N.W.2d 504 (1994). However, agency regulations, properly adopted and filed with the Secretary of State of Nebraska, have the effect of statutory law. *Lynch v. Nebraska Dept. of Corr. Servs.*, 245 Neb. 603, 514 N.W.2d 310 (1994); *Nucor Steel v. Leuenberger*, 233 Neb. 863, 448 N.W.2d 909 (1989).

The meaning of a statute is a question of law, and a reviewing court is obligated to reach its conclusions independent of the determination made by the administrative agency. *Central Platte NRD v. State of Wyoming*, 245 Neb. 439, 513 N.W.2d 847 (1994). This court is obligated to reach an independent conclusion as to whether the Department's interpretation of its regulations was plainly erroneous or inconsistent, as was the district court.

For the sake of simplicity, we have referred to Meriel Stauffer's financial relationship with Sunrise as a "loan." However, it is clear that reimbursement of payments to Meriel Stauffer, whether characterized as interest on a loan or as return on equity, would have been prohibited by Department regulations during the years in question, 1984-90. If the payments were considered to be return on equity, they were an unallowable cost under 471 Neb. Admin. Code, ch. 12, § 011.05(12). If the payments were interest on a loan, they were unallowable under HIM §§ 202.1 and 202.3, because the lender, Meriel Stauffer, and the borrower, Sunrise, were related parties, and thus the interest was not proper.

However, it does not necessarily follow that interest on a

replacement loan is likewise an unallowable cost in the absence of a regulation specifically disallowing reimbursement for such costs.

The Court of Appeals of Maryland considered a similar situation in *Liberty Nursing v. Department*, 330 Md. 433, 624 A.2d 941 (1993). In that case, a grandson inherited a majority share in a nursing home business from his grandmother. The land and buildings used by the nursing home were owned by the grandmother's estate and were leased to the nursing home.

Because there were insufficient liquid assets in the estate to pay the estate taxes, it became necessary to sell the facilities. The grandson bought the facilities himself rather than sell them to a third party. The purchase was financed through a bank at 11 percent interest in an arm's-length transaction and was secured by a mortgage on the facilities. The grandson had no ownership in, or control of, the bank.

The interest on the loan was disallowed under the Maryland Medical Assistance Program on the ground that the nursing home, the grandson, and the grandmother's estate were "related organizations." The grandson appealed to the Nursing Home Appeal Board, the circuit court for Baltimore City, and the Court of Special Appeals, all of which affirmed the disallowance of the interest cost.

The Maryland Court of Appeals reversed the lower tribunals' rulings, stating that for purposes of the relatedness test, "the relevant transaction is the loan transaction, not the transaction giving rise to it. Therefore, *the critical relationship is that of lender to borrower*, not seller to purchaser . . . ." (Emphasis supplied.) 330 Md. at 447, 624 A.2d at 948. The Maryland court pointed out that this is consistent with the purpose of the regulation, i.e., to " 'assure that loans are legitimate and are needed, and that the interest rate is reasonable.' " *Id.*

We agree with the reasoning of the Maryland Court of Appeals. Moreover, because the regulations in question have the effect of statutory law, we must give effect to the plain language contained therein. See *Association of Commonwealth Claimants v. Moylan, ante* p. 88, 517 N.W.2d 94 (1994). According to the plain language of HIM § 202.1,

interest paid to the Bank by Sunrise is a reimbursable expense and is proper.

Therefore, we hold that for purposes of determining whether interest on a loan is proper for purposes of medicaid reimbursement the inquiry must be whether the lender and the borrower of the loan in question are related entities, in the absence of a regulation to the contrary. There being no dispute that the loan was one between Sunrise and the Bank, unrelated parties, we hold that the loan is proper as defined by HIM § 202.3.

We next determine whether there was competent evidence from which the district court could conclude that the loan from the Bank to Sunrise was necessary. The Department contends that Sunrise has never shown that either loan was necessary.

Sunrise argues that the Department originally denied the interest expense on the basis that it was not proper, and that the Department's claim that the interest expense was also unnecessary represents a deviation from its original position. Sunrise bases this upon its auditor's workpapers at the time the interest expense was first disallowed. The auditor had written that "[p]er HIM-15 218.1, interest cost paid by the facility to a stockholder is not an allowable cost. Since the Farmers and Merchants Bank loan merely replaces the original note, the interest is not allowed."

The auditor's workpapers were dated "7-19-88." On September 20, 1988, the Department notified Sunrise by mail of cost adjustments for 1988, as well as for the previous 3 years. Adjustments to the interest expense for each of the 4 years were explained as follows: "To remove the interest on *unnecessary* borrowing. The loan was used to pay off a note payable to the stockholder." (Emphasis supplied.) Thus, it is clear that the Department not only considered the interest expense unnecessary from the beginning, but also notified Sunrise of that fact.

Sunrise also argues that, because the Department had reimbursed Sunrise for return on equity up until that item was made an unallowable expense, the Department must have considered the expense necessary, and therefore the replacement loan was also necessary.

We agree with the Department that Sunrise has failed to present evidence that either loan was necessary. There is no testimony as to the purpose of Meriel Stauffer's original loan to Sunrise or as to what the money was actually used for. There is likewise no testimony that the replacement loan was actually used to meet patient care needs.

Sunrise's accountant testified that a nursing home such as Sunrise, which has a high mix of medicaid patients, needed to have sufficient funds on hand to cover unreimbursed costs and that "[i]t could very well be" that the nursing home might need to get funds from an outside source to help with patient care. However, such a statement amounts to no more than speculation. The accountant at no time testified that either the loan from Meriel Stauffer or the loan from the Bank was actually used to cover unreimbursed costs of patient care.

Aside from a conclusory statement by Sunrise's accountant that the Department "fully believed [the return on equity] was related to patient care or they would not have paid it" prior to the time such expense was disallowed, there is no competent evidence in the record from which it could be determined whether either loan was related to patient care in any way. Therefore, the district court's decision is in error and must be reversed.

CONCLUSION

Having reviewed the district court's judgment for error appearing on the record, and having found that the district court's decision is not supported by competent evidence, we reverse and remand the decision of the district court with direction to reinstate the order of the Department.

REVERSED AND REMANDED WITH DIRECTION.

WRIGHT, J., participating on briefs.

LANPHIER, J., not participating.

S.I., APPELLANT, V. H. MICHAEL CUTLER AND BETTY F. CUTLER, APPELLEES.

523 N.W.2d 242

Filed October 28, 1994. No. S-93-152.

1. **Demurrer: Pleadings: Appeal and Error.** When reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept as true the conclusions of the pleader.
2. **Demurrer: Pleadings.** In ruling on a demurrer, the petition is to be construed liberally. If as so construed the petition states a cause of action, the demurrer is to be overruled.
3. **Negligence: Proof.** In order to succeed in an action based on negligence, a plaintiff must establish the defendant's duty not to injure the plaintiff, a breach of that duty, proximate causation, and damages.
4. **Negligence.** The question of whether a legal duty exists for actionable negligence is a question of law dependent upon the facts in a particular situation.
5. **Invitor-Invitee: Negligence: Liability.** The possessor of land is not required to anticipate the unforeseeable acts of third persons. It is only when such acts can reasonably be anticipated that the possessor has a duty to take some precautionary measures to protect against such independent acts.

Appeal from the District Court for Douglas County: JOSEPH S. TROIA, Judge. Reversed and remanded for further proceedings.

David R. Stickman for appellant.

Joseph E. Jones, of Fraser, Stryker, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellees.

HASTINGS, C.J., WHITE, CAPORALE, FAHRNBRUCH, and LANPHIER, JJ., and BOSLAUGH, J., Retired.

PER CURIAM.

S.I. brought an action against H. Michael Cutler and Betty F. Cutler, alleging that because of their negligence, the Cutlers were liable for an assault upon S.I. by a third party which occurred on premises owned by the Cutlers. The district court sustained the Cutlers' demurrer to S.I.'s third amended petition and dismissed the case. S.I. appeals, assigning as error the district court's ruling on the demurrer.

SCOPE OF REVIEW

When reviewing an order sustaining a demurrer, an appellate

court accepts the truth of the facts which are well pled, together with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept as true the conclusions of the pleader. *Erichsen v. No-Frills Supermarkets, ante* p. 238, 518 N.W.2d 116 (1994); *Durand v. Western Surety Co.*, 245 Neb. 649, 514 N.W.2d 840 (1994).

FACTS

In our review of the district court's ruling on the demurrer, we accept as true the following allegations in S.I.'s third amended petition: At all times relevant, the Cutlers were the owners of a building located at 3000 Farnam Street in Omaha. On July 5, 1990, S.I. was an employee of the Visiting Nurses of the Midlands, which was a tenant of the building owned by the Cutlers. As such, S.I. was a business invitee. S.I. was assaulted in the elevator of the building as she reported for work at approximately 8:30 a.m. on July 5. The assailant also attempted to take S.I., via the elevator, to the vacant ninth floor of the building.

We also accept as true S.I.'s allegations that a burglary had occurred in the building on January 10, 1990; that the assailant and other unknown persons had assaulted or otherwise threatened the Cutlers' business invitees on other occasions; that the Cutlers knew or should have known that the assailant had been standing in the entrance of the building since 8 a.m. on July 5 and had previously been ejected from the building by a security guard for loitering; and that the assailant had assaulted patrons of the Cutlers' building several times prior to the attack on her.

S.I.'s third amended petition alleged that the Cutlers' security guard knew that the assailant had been observed loitering around the building for 3 to 4 months and, specifically, had been observed 3 or 4 days prior to the attack on her. S.I. further alleged that the Cutlers and their security guard had received complaints about the assailant's presence and the assaults he committed on the premises.

ANALYSIS

When reviewing an order sustaining a demurrer, an appellate court accepts the truth of the facts which are well pled, together

with the proper and reasonable inferences of law and fact which may be drawn therefrom, but does not accept as true the conclusions of the pleader. *Erichsen v. No-Frills Supermarkets, supra*; *Durand v. Western Surety Co., supra*. In ruling on a demurrer, the petition is to be construed liberally. If as so construed the petition states a cause of action, the demurrer is to be overruled. *Hoiengs v. County of Adams*, 245 Neb. 877, 516 N.W.2d 223 (1994).

S.I.'s claim is based on the theory that the Cutlers were negligent and were liable for the acts of a third party which occurred on property owned by them. In order to succeed in an action based on negligence, a plaintiff must establish the defendant's duty not to injure the plaintiff, a breach of that duty, proximate causation, and damages. *Zeller v. County of Howard*, 227 Neb. 667, 419 N.W.2d 654 (1988). The question of whether a legal duty exists for actionable negligence is a question of law dependent on the facts in a particular situation. *Schmidt v. Omaha Pub. Power Dist.*, 245 Neb. 776, 515 N.W.2d 756 (1994); *Parrish v. Omaha Pub. Power Dist.*, 242 Neb. 783, 496 N.W.2d 902 (1993).

From the facts alleged in the petition, we must consider whether the Cutlers had a legal duty to protect S.I. from the criminal acts of a third party. " 'A duty, in negligence cases, may be defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.' " *Schmidt*, 245 Neb. at 786, 515 N.W.2d at 763, quoting W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 53 (5th ed. 1984).

In order to state a cause of action, S.I. must allege facts which, if true, would establish a duty on the part of the Cutlers to protect her from the criminal acts of a third person. Factors to consider in imposing a duty on a landlord include weighing the relationship of the parties against the nature of the risk and the public interest in the proposed solution, the likelihood of injury, the magnitude of the burden of guarding against the injury, and the consequences of placing that burden on a defendant. See *C.S. v. Sophir*, 220 Neb. 51, 368 N.W.2d 444 (1985).

Whether the Cutlers owed a duty to S.I. depends upon

whether her injury was reasonably foreseeable. As Justice Cardozo stated in *Palsgraf v. Long Island R. R. Co.*, 248 N.Y. 339, 344, 162 N.E. 99, 100 (1928), "The risk reasonably to be perceived defines the duty to be obeyed . . . ." The possessor of land is not required to anticipate the unforeseeable acts of third persons. It is only when such acts can reasonably be anticipated that the possessor has a duty to take some precautionary measures to protect against such independent acts. *Harvey v. Van Aelstyn*, 211 Neb. 607, 319 N.W.2d 725 (1982). Prior acts or events may establish whether the acts of third parties are foreseeable. Thus, if the landowner, by the exercise of reasonable care, could have foreseen the occurrences of such acts, then the landowner must exercise reasonable care to keep the premises safe for business invitees.

In *Harvey*, 211 Neb. at 611-12, 319 N.W.2d at 727-28, quoting *Hughes v. Coniglio*, 147 Neb. 829, 25 N.W.2d 405 (1946), we reiterated the rule of Restatement (Second) of Torts § 344 (1965):

> "[T]he proprietor of a place of business who holds it out to the public for entry for his business purposes, is subject to liability to members of the public while upon the premises for such a purpose for bodily harm caused to them by the accidental, negligent, or intentionally harmful acts of third persons, if the proprietor by the exercise of reasonable care could have discovered that such acts were being done or were about to be done, and could have protected the members of the public by controlling the conduct of the third persons or by giving a warning adequate to enable them to avoid harm. . . ."

We also recognized that the possessor of land who holds it open to the public for entry for his business purposes is not an insurer of the safety of such visitors against the acts of third persons, but that

> "[h]e is, however, under a duty to exercise reasonable care to give them protection. In many cases a warning is sufficient care if the possessor reasonably believes that it will be enough to enable the visitor to avoid the harm, or protect himself against it. There are, however, many situations in which the possessor cannot reasonably

> assume that a warning will be sufficient. He is then required to exercise reasonable care to use such means of protection as are available, or to provide such means in advance because of the *likelihood* that third persons . . . may conduct themselves in a manner which will endanger the safety of the visitor."

Harvey, 211 Neb. at 614-15, 319 N.W.2d at 729. We affirmed the district court's granting of a directed verdict for the bar owner in *Harvey*, holding that the bar owner was not bound to anticipate the unforeseen entry of the third party on the premises and the totally unexpected subsequent assault upon the plaintiff.

One prior incident may not be sufficient to impose a duty upon the landowner. In *C.S. v. Sophir, supra*, we affirmed the trial court's denial of recovery against the landlord in an action brought by a tenant who was sexually assaulted. Although there had been one prior assault on the premises, we held that it would be unfair to impose liability upon a landlord based on a single prior assault at the apartment complex. We noted that other courts had imposed liability only where there was a history of criminal activity at the premises which created notice of the foreseeability that such activity would occur in the future.

However, in *K.S.R. v. Novak & Sons, Inc.*, 225 Neb. 498, 406 N.W.2d 636 (1987), we held that the landlord had a duty to protect the tenant against the foreseeable criminal acts of a third person because a history of criminal activity existed. In that case, the landlord failed to repair the lock on the front door of the tenant's apartment after being asked to do so, and the tenant was sexually assaulted in her apartment. In reversing the summary judgment in favor of the landlord, we held that there were genuine issues of material fact as to foreseeability, negligence, and proximate cause.

The apartment complex was not equipped with locks on the outside doors, and the common areas were accessible to anyone. Two days before the assault, the tenant observed the assailant masturbating in a laundry room directly across from her apartment, and she reported the incident to the police. Two days later, she was confronted by the assailant in her apartment,

at which time she was sexually assaulted at knifepoint.

Approximately 1 week prior to the assault, the tenant's door had been kicked in, and the dead bolt on the door separating the apartment from the common hallway was broken. The tenant had reported the incident to the apartment manager and made daily requests that the lock be repaired. No action was taken until the morning after the assault. The assailant had a history of frequenting the building, and the apartment manager acknowledged that the assailant had been caught several times masturbating in the building. The manager told police that the assailant had previously broken into a tenant's apartment and stood naked at the foot of the bed in a nearby building owned and managed by the defendant. We distinguished *K.S.R.* from *Sophir* based on the repeated intrusions and objectionable sexual conduct of the assailant which were known to the landlord and the history of criminal activity by the assailant at the leased premises.

In the case at bar, the factual situation falls somewhere between that of *K.S.R.* and that of *Sophir*. The Cutlers had contacted a security company to protect their business invitees against the criminal acts of third parties. There was a history of criminal activity at the Cutlers' premises in that the assailant had previously been ejected from the building by the Cutlers' security guard for loitering and assaulting patrons of the building. The assailant had been observed loitering in and around the building for 3 to 4 months and, specifically, had been observed 3 or 4 days prior to the attack. On the day of the incident, the assailant had been standing in the entrance of the Cutlers' building for half an hour prior to the assault.

When we consider the relationship between S.I. and the Cutlers, the nature of the attendant risk, the opportunity and ability of the Cutlers to exercise reasonable care, and the public's interest in a solution to the security problem, we find that the Cutlers had a duty to exercise reasonable care to protect S.I. under the circumstances alleged in her third amended petition. This duty is imposed because the third amended petition alleged a sufficient amount of criminal activity by this particular assailant to make further criminal acts by the assailant reasonably foreseeable. It was alleged that the

assailant was known to have assaulted other persons on the Cutlers' premises, and this activity imposed a duty on the Cutlers to take reasonable precautions to protect persons entering the premises from this assailant.

The facts as alleged in the third amended petition, when taken as true for purposes of the demurrer, show that this incident was not the result of a random criminal act by a third party and that the actions of the assailant were reasonably foreseeable. The district court erred in sustaining the demurrer and dismissing the third amended petition; therefore, the judgment of the district court is reversed and the cause is remanded for further proceedings.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WRIGHT, J., participating on briefs.

FAHRNBRUCH, J., concurring.

I concur with both the reasoning and the result in this case and wish to distinguish my position in this case from my position in *Erichsen v. No-Frills Supermarkets, ante* p. 238, 518 N.W.2d 116 (1994), in which I dissented.

Although the court majority reaches the same result in each case, the cases are factually dissimilar. In *Erichsen*, the plaintiff, a business invitee, was attacked in a parking lot which served several businesses, including the one which the plaintiff had patronized before her assault. The attack was apparently a random one by an individual who was completely unknown to the business owner. The plaintiff's most serious injuries occurred when she attempted to retrieve her purse from the attacker's automobile, became entangled in the seatbelt, and was dragged for a distance of some 1.6 miles.

I dissented in *Erichsen* because a random criminal attack is as foreseeable to a victim as to a business owner, the manner in which the plaintiff was injured was bizarre and utterly unforeseeable to a business owner, and there exists no practical way for a business owner to either warn or protect victims of such attacks in a parking lot. Furthermore, even though the majority in *Erichsen* was willing to impose a duty upon a business owner to either warn or protect customers, the court

was unwilling or unable to say how a business owner might meet this duty and thus comply with the law.

I find the facts in the present case to be much more compelling for the imposition of a duty on the building owners to provide a safe environment for business invitees. Perhaps most significantly, S.I. was attacked by an individual who not only had been involved in attacks on other patrons of the building, but who had also been observed in the entrance to the building for at least 30 minutes prior to the assault on S.I. The Cutlers or their agent, the security guard, were aware of this, while S.I. apparently was not. It should have been entirely foreseeable to the Cutlers that an individual with a known history of violence on the premises would engage in further acts of violence. Thus, I would impose on the Cutlers a duty to protect a business invitee which I was unwilling to impose on No-Frills.

JANET RAINS, APPELLANT AND CROSS-APPELLEE, V. BECTON, DICKINSON AND COMPANY, APPELLEE AND CROSS-APPELLANT.

523 N.W.2d 506

Filed October 28, 1994. No. S-93-173.

1. **Employment Contracts.** Whether a contract of employment exists is a question of law.
2. **Contracts.** A contract must be construed as a whole and, if possible, effect given to every part thereof.
3. _____. The terms of a contract are to be accorded their plain and ordinary meaning as ordinary, average, or reasonable persons would understand them.
4. **Contracts: Intent.** A contract which is written in clear and unambiguous language is not subject to interpretation or construction; rather, the intent of the parties must be determined from the contents of the contract, and the contract must be enforced according to its terms.
5. **Contracts.** Whether a contract is ambiguous is a question of law.
6. _____. The construction of a contract is a question of law.

7. **Appeal and Error.** In connection with a question of law, an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by any inferior court.

Appeal from the District Court for Platte County: ROBERT STEINKE, Judge. Affirmed.

Richard K. Watts, of Mills, Papik & Watts, for appellant.

Robert F. Rossiter, Jr., of Fraser, Stryker, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellee.

HASTINGS, C.J., WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ., and BOSLAUGH, J., Retired.

CAPORALE, J.

In this wrongful termination of employment case, the plaintiff-appellant employee, Janet Rains, asserts, in summary, that the trial court erred in ruling in favor of the defendant-appellee employer, Becton, Dickinson and Company. By way of cross-appeal, the company avers that the district court erred in finding that the arrangement between Rains and the company was anything other than an employment at will. On our own motion, we removed the appeal from the Nebraska Court of Appeals to this tribunal in order to regulate the caseloads of the two courts. We now affirm.

Rains was hired on February 16, 1976, and worked at the company's Columbus, Nebraska, plant until her services were terminated on August 16, 1990, for having literally lain down on the job.

Rains testified that on the morning in question, August 11, she felt ill and, after doing some initial setup of her work area, decided that if she could rest she could finish her shift. She therefore climbed into a loft area to lie down, telling no one where she was going. After 2 to 10 minutes, she was discovered by her supervisor, whom she had not otherwise seen that day. Although the plant had no infirmary, sick employees usually reported to their supervisors and then rested in the restrooms or on benches in the break room.

In early 1986, the company had distributed to all employees of the plant a handbook entitled "Your Company and You." As

required by the company, Rains signed an acknowledgment that she had received the handbook, read it, and understood its terms.

The handbook contains information about the company, as well as procedures, guidelines, and policies. A section entitled "Disciplinary Action and Performance Documentation" sets forth a three-step system of progressive discipline for violations of company rules and regulations, as follows:

> Regulations for acceptable conduct of employees are necessary for the orderly operation of any business, and for the benefit and protection of the rights and safety of its employees. From time to time, it becomes necessary to enforce the compliance of these rules and regulations.
>
> The employee is expected to maintain proper discipline in personal standards of conduct at all times.
>
> To ensure uniformity of rule enforcement, the following guidelines of action will generally be followed for disciplinary problems:
>
> 1. First offense - verbal warning. Explanation and verbal counseling by the supervisor. Verbal warnings will be documented by the Supervisor.
>
> 2. Second offense - written warning. A written warning records the infraction, a statement of the expected corrective action, and a statement of the consequences of any future or repeated violations. Written warnings will be prepared in triplicate with a copy to the employee, a copy to the Supervisor, and the original to the Human Resources Department where a record of all offenses will be maintained.
>
> 3. Third offense - suspension or discharge.
>
> The above guidelines will apply in most situations; however, certain rule infractions are so serious that a written warning or even discharge must be applied. If the first offense warrants a written warning and there is a repeated infraction of the same rule within a 6-month period, the next action may be discharge. In such applications of management action, all facts and circumstances pertinent to the offense will be considered.

The introductory statement to the subsequent section,

"Rules and Regulations," provides that violations "of the following rules and regulations shall be grounds for management action." Of the 28 rules listed, 3 specifically provide that a violation will result in discharge. These three rules deal with bringing firearms to work; bringing, using, distributing, or being under the influence of intoxicants or narcotics at the workplace; and theft. Three other rules, relating to the falsification of timecards, immoral conduct, and insubordination, provide that a violation may result in discharge. Neither the rule at issue nor any of the remaining rules state that a violation may or will result in discharge. This section also provides that the rules and regulations listed "are not all inclusive. Should it be necessary to establish additional rules or policies, these will be communicated to employees."

The rule at issue reads: "LEAVING PLANT OR WORKPLACE - Permission must be obtained from your supervisor to leave the plant at any time other than lunch period or scheduled quitting time. You are not allowed to leave your assigned place of work without proper authorization, personal needs excepted."

The company's human resources director testified that after investigation, Rains' violation was considered serious enough to warrant discharge because she

> left her designated workplace; she went to a concealed area; she had no intention of being discovered; we believe she laid down; and we believe she went to sleep; and we believe she would have been there longer than 10 or 15 minutes if [her supervisor] had not woke her up.

Her actions were considered a blatant and conscious attempt to conceal herself.

We note that the company cross-appeals on the basis that the trial court found the handbook constituted a contract, but it is not at all clear that such was the case. It is true that in one portion of its written findings of fact and conclusions of law, the trial court recited that "the terms of the handbook relating to discipline are definite enough in form to constitute a unilateral contract of employment." However, immediately following that declaration, the trial court announced that "[e]ven assuming the existence of such a contract," the

language of the handbook may be such as to reserve certain discretion in the company or give it the right to amend or modify the provisions of the handbook.

The language "even assuming" seemingly contradicts the language of the sentence preceding it, which declares that the handbook constitutes a contract. Although whether a contract of employment exists is a question of law, *Johnston v. Panhandle Co-op Assn.*, 225 Neb. 732, 408 N.W.2d 261 (1987), we need not concern ourselves with the conundrum posed by the trial court's pronouncements, for assuming, but not deciding, that the language of the handbook made Rains' employment something other than at will, the company nonetheless acted within its rights.

A contract must be construed as a whole and, if possible, effect given to every part thereof. *Baker's Supermarkets v. Feldman*, 243 Neb. 684, 502 N.W.2d 428 (1993). Its terms are to be accorded their plain and ordinary meaning as ordinary, average, or reasonable persons would understand them. *Murphy v. City of Lincoln*, 245 Neb. 707, 515 N.W.2d 413 (1994). A contract which is written in clear and unambiguous language is not subject to interpretation or construction; rather, the intent of the parties must be determined from the contents of the contract, and the contract must be enforced according to its terms. *Id.*; *Baker's Supermarkets, supra.* Whether a contract is ambiguous is a question of law, *Plambeck v. Union Pacific RR. Co.*, 244 Neb. 780, 509 N.W.2d 17 (1993), as is the construction of a contract, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the lower courts, *Baker's Supermarkets, supra.*

Given those rules, the legally proper adjudication of this case is foreshadowed by our holdings in *Goodlett v. Blue Cross*, 234 Neb. 5, 449 N.W.2d 9 (1989), and *Johnston, supra.*

In *Goodlett*, by declaring that the provisions of that defendant's handbook could have become part of the employee's otherwise oral contract of employment, we assumed the existence of a contract of employment specifying a four-step progressive system of discipline. The first step provided for an oral warning, the second for a written warning, and the third

for a period of probation. While the opinion does not detail the discipline contemplated by the fourth step, it does reveal that the employee's services were terminated. The employee complained that she had been given no oral warning. We ruled that by providing that " '[i]f the offense is of a very serious nature and requires immediate action, the manager is not required to go through Steps 1 and 2,' " the assumed contract "permit[ted] the employer to modify its disciplinary procedure in appropriate circumstances." *Id.* at 10, 449 N.W.2d at 12.

In *Johnston*, we concluded that a handbook which set a future salary, stated that after a defined period of probationary status employment would be permanent, and specified six examples of cause for dismissal did not create an arrangement for anything other than at-will employment.

Here, only approximately 10 percent of the rules contained in the rules and regulations section of the handbook specifically provide that their violation will result in discharge; however, the "Disciplinary Action and Performance Documentation" section of the handbook does not specify that the three-step system of progressive discipline will always be used, only that generally it will be applied. Moreover, that section recites that "guidelines" in the handbook will apply not in all circumstances, but only "in most situations" and that "certain rule infractions are so serious" that discharge must be the penalty. The handbook further provides that the rules and regulations listed are not all-inclusive. Although the handbook provides that additional rules or policies adopted will be communicated to employees, it does not specify that such will be done before implementation.

Thus, like the employers in *Goodlett* and *Johnston*, the company retained the discretion to modify its disciplinary procedure at will, thereby reserving the right to discipline as it saw fit and to determine that particular conduct was sufficiently severe as to warrant discharge. In such a situation, the company need not first resort to either of the other two less severe sanctions.

Indeed, the handbook language here was even more discretionary than the handbook language in *Johnston*, for the *Johnston* language contained no suggestion that the rules were

not all-inclusive, nor did the *Johnston* handbook provide that the guidelines specified would apply in only most situations or that certain rule infractions are so serious that a discharge must be applied.

Consequently, since the company found the infraction to be serious, it had the right to discharge Rains the first time she violated the rule against leaving her assigned place of work without first obtaining proper authorization. The judgment of the trial court, being correct, is affirmed.

AFFIRMED.

WHITE, J., concurring.

Reluctantly, I agree with the result announced by the majority. It is a cruel fact of employee life: That which the employer grants with the one hand is easily taken away by the other. The vague promises of clear standards and fair procedure are merely puffing. The simple fact is that when the employer determines to fire an employee, in general, it may do so if the option to disregard the procedure is reserved or if it is announced that the pamphlet does not constitute a contract.

LANPHIER, J., joins in this concurrence.

STATE OF NEBRASKA, APPELLEE, V. FRANCES L. THOMPSON, APPELLANT.

523 N.W.2d 246

Filed October 28, 1994. No. S-94-049.

1. **Motions for New Trial: Prosecuting Attorneys: Appeal and Error.** An appellate court reviews a motion for new trial on the basis of prosecutorial misconduct for an abuse of discretion of the trial court.
2. **Trial: Words and Phrases.** A trial court abuses its discretion when its rulings are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result.
3. **Due Process: Prosecuting Attorneys: Evidence.** Irrespective of a prosecutor's good or bad faith, suppression of material evidence favorable to an accused violates due process.
4. **Evidence: Appeal and Error.** In addressing materiality, an appellate court must evaluate the omitted evidence in the context of the entire record.

5. **Constitutional Law: Evidence.** If omitted evidence creates a reasonable doubt of guilt that otherwise did not exist, then a constitutional error has been committed.
6. **Motions for New Trial: Words and Phrases.** "Unavoidably prevented" as used in Neb. Rev. Stat. § 29-2103 (Reissue 1989) refers to circumstances beyond the control of the party filing the motion for new trial.
7. **Trial: Appeal and Error.** The law requires diligence, and mere neglect will not entitle a party to relief.
8. **Prosecuting Attorneys: Evidence: Impeachment.** The government may not withhold impeachment evidence that is material.

Appeal from the District Court for Knox County: RICHARD P. GARDEN, Judge. Affirmed.

Patricia Knapp and Bruce Ellison for appellant.

Don Stenberg, Attorney General, and Marilyn B. Hutchinson for appellee.

HASTINGS, C.J., WHITE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ., and BOSLAUGH, J., Retired.

HASTINGS, C.J.

The defendant, Frances L. Thompson, appeals from the judgment of the district court which overruled her motion for a new trial. Actually, Thompson filed one motion on May 24, 1993, claiming newly discovered evidence, and a supplement to that motion on November 23, claiming prosecutorial misconduct in withholding potentially exculpatory materials. The trial court ordered that "the Motion for New Trial based on newly discovered evidence is overruled and the Motion for New Trial based upon prosecutorial misconduct is overruled." Thompson's sole assignment of error is as follows:

> The Trial Court erred in denying the Defendant's Motions for New Trial for the suppression of potentially exculpatory and impeaching evidence and information which leads to such evidence, in violation of the Defendant's Rights to Due Process of Law, including her Rights of Confrontation and a Fair Trial.

On August 19, 1992, a jury convicted Thompson of first degree murder and use of a firearm to commit a felony in the killing of Dean Frank. Thompson directly appealed, and this court affirmed the jury's verdict and the judgment of the

district court. *State v. Thompson*, 244 Neb. 375, 507 N.W.2d 253 (1993) (*Thompson I*). In the present appeal, Thompson does not challenge the trial court's finding that the death certificate is not newly discovered evidence.

STANDARD OF REVIEW

An appellate court reviews a motion for new trial on the basis of prosecutorial misconduct for an abuse of discretion of the trial court. *State v. Boppre*, 243 Neb. 908, 503 N.W.2d 526 (1993). A trial court abuses its discretion when its rulings are clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result. *State v. Trackwell*, 244 Neb. 925, 509 N.W.2d 638 (1994). At the heart of Thompson's argument that the prosecutor suppressed material evidence is the right to a fair trial mandated by the Fifth Amendment to the U.S. Constitution. See *United States v. Agurs*, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976). Irrespective of a prosecutor's good or bad faith, suppression of material evidence favorable to an accused violates due process. *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). In addressing materiality, we must evaluate the omitted evidence in the context of the entire record. *United States v. Agurs, supra*. If the evidence creates a reasonable doubt of guilt that otherwise did not exist, then a constitutional error has been committed. *State v. Atwater*, 245 Neb. 746, 515 N.W.2d 431 (1994).

FACTS

The facts as adduced at Thompson's trial are detailed in *Thompson I*. We repeat only those facts which are necessary for a decision on this appeal.

The Knox County Sheriff's Department arrested Thompson on August 18, 1991, charging her with first degree murder and use of a firearm to commit a felony regarding the August 18 murder of Frank. According to Thompson's statement of the events of August 18, Frank entered her house with groceries which he put in Thompson's refrigerator. Frank then approached Thompson, screaming something which Thompson was sure amounted to "I'm going to kill you." Thompson responded by picking up a .357 Magnum revolver, and when Frank moved closer to Thompson, she rapidly fired

six shots at him. Thompson then called the sheriff's office to report the incident and reloaded her gun. According to Thompson, she had a friendly discussion with the victim until rescue personnel and deputies arrived. Despite efforts at cardiopulmonary resuscitation by the rescue squad, Dr. Ken Pavlik of Verdigre pronounced Frank dead at 7 p.m.

Similar to Thompson's account, Sheriff Wes Eisenbeiss reported that at 5:35 p.m. on August 18, Thompson called and reported a shooting at her residence, stating, "I just shot somebody. He came in my house. He was going to kill me."

Upon arriving at the Thompson residence, however, Deputy Don Henery observed bullet holes in the floor "at such an angle that the person would be shooting . . . downward . . . towards the floor." Deputy J.F. Janecek examined the crime scene and determined that Frank was hit with multiple rounds from a .357 Magnum revolver and that bullet hole angles in the floor indicated that Thompson fired three shots as Frank lay on the floor. Deputy Janecek stated that "it appeared to me that those three rounds had indeed missed Mr. Frank . . . because of the fact that there were no blood splatters or blood marking around the entry holes of these bullets into the floor."

Deputy Henery observed Frank's autopsy and noted six wounds inflicted on the victim. Dr. Brad Randall, the pathologist who performed the autopsy, advised Deputy Henery that two wounds were fatal. The bullet that entered the right rear area of Frank's back and exited the right front part of the abdomen was "definitely" fatal "because the liver was destroyed by the bullet as it passed through the body" leaving "no chance of survival." Furthermore, the bullet that entered the left front abdomen and exited the left rear area of Frank's back "could also have been a fatal shot, because of damage to the one kidney and a bowel." Dr. Randall however advised that "Frank could probably have survived [the kidney wound] if this had been the only wound."

Dr. Randall's autopsy report indicated that Frank suffered three gunshot wounds. The gunshot wound "to the right back passing through the liver and right lung" and the gunshot wound "through the lateral left mid-abdomen passing through loops of bowels and the left kidney" were "sufficient to

represent the cause of death." The third gunshot wound entered the "right buttocks resulting in a partial fracture of the neck of the right femur."

During the trial, Dr. Randall testified that Frank could have lived only 10 to 15 minutes after suffering the gunshot wound to the liver and lung. Furthermore, according to Dr. Randall, Frank appeared to survive the wound to the upper left abdomen for some time. Thus, Dr. Randall believed that the three gunshot wounds were not inflicted at the same time and that Thompson possibly fired the fatal shot to Frank's right back shortly before the sheriff's department and rescue personnel arrived. *Thompson I.*

The Knox County Attorney, John Thomas, signed Frank's death certificate, certifying that Frank died at 7 p.m. on August 18, 1991. The remaining portion of the death certificate, which Thomas was responsible for filling out, indicated the immediate cause of death as multiple trauma due to gunshot wounds to the abdomen and the time interval between onset and death as 1 hour 25 minutes.

Prior to trial, the district court denied Thompson's motion for recusal of the county attorney, which motion alleged that he was a potential defense witness. On May 26, 1992, Thompson moved for discovery of reports and documents regarding Frank's death prepared by the county attorney in his capacity as county coroner. On June 1, the trial court denied the discovery motion. On August 19, the jury found Thompson guilty of first degree murder and use of a firearm to commit a felony.

On May 24, 1993, more than 9 months after her conviction, Thompson moved for a new trial, stating that in April 1993, her counsel received a copy of Frank's death certificate "from an individual who managed to obtain it earlier in the month." According to Thompson, the death certificate substantiated her trial argument that at approximately 5:30 p.m., she shot Frank three times in the abdomen and then called the sheriff to report the shooting, and at 7 p.m., Frank died from the gunshots. Thompson claimed that the death certificate would have made the county attorney a material witness in her defense and probably resulted in her acquittal. Thompson submitted as an exhibit a May 15, 1992, letter from her counsel to the county

attorney requesting reports and interviews regarding Frank's death prepared and conducted by the county attorney in his capacity as coroner.

On July 7, 1993, the district court held a hearing on Thompson's motion. Thompson argued that she attempted to obtain coroner documents, but the county attorney denied her access. According to Thompson, the county attorney should have disclosed the death certificate as exculpatory and substantial impeaching evidence. Thompson argued that the death certificate not only substantiated her contention, but was inconsistent with Dr. Randall's testimony that the fatal wound killed Frank within 10 to 15 minutes. Thompson's direct appeal was still pending before this court; therefore, the district court held that it did not have jurisdiction and allowed the motion to pend.

On November 23, 1993, Thompson filed a supplement to her motion for a new trial. Thompson alleged that during the June 1, 1992, hearing the county attorney misled defense counsel to believe that there did not exist any exculpatory evidence in documents prepared by the county attorney in his capacity as coroner. Thompson claimed that the suppression of potential exculpatory evidence was further ground for a new trial based upon prosecutorial misconduct.

In a December 6, 1993, hearing, the county attorney testified that he compiled the information for the death certificate from the Knox County sheriff's office, the pathologist, and the pathologist's preliminary autopsy report. The county attorney stated that Dr. Randall had told him and had testified that two gunshot wounds caused Frank's death. When asked if he disclosed to defense counsel the pathologist's preliminary report, the county attorney replied: "I believe so, I'm almost certain." The county attorney testified that he did not provide defense counsel with a copy of the death certificate and responded affirmatively when asked if, at the June 1, 1992, hearing, he represented to the court that he had not made a coroner's report regarding Frank's death. The county attorney also stated that he calculated the time interval on the death certificate based upon Thompson's call to the sheriff and the pronouncement of death as obtained from the sheriff's office.

Additionally, the record made at the original trial and the report of the rescue squad disclosed that a local physician, Dr. Pavlik, had pronounced Frank dead at 7 p.m.

Following the hearing, the trial court held that under Neb. Rev. Stat. § 29-1912(1)(f) (Reissue 1989), Thompson was not entitled to discover the death certificate. Section 29-1912(1)(f) provides that the prosecuting attorney shall permit the defendant to inspect and copy "[d]ocuments, papers, books, accounts, letters, photographs, objects, or other tangible things of whatsoever kind or nature which could be used as evidence by the prosecuting authority." As to whether the death certificate could be considered exculpatory, the court held that the death certificate was immaterial and inadmissible because the county attorney's lay opinion regarding cause of death was incompetent. The court also held that the death certificate was not newly discovered evidence because it had been filed on August 29, 1991, and, thus, was accessible by writing to the Bureau of Vital Statistics. Last, as to whether the death certificate could be impeachment evidence, the court held that the certificate does not wholly reflect Thomas' conversation with Dr. Randall and is not "evidence of anything." The district court, therefore, overruled Thompson's motion for a new trial.

ANALYSIS

Thompson alleged two grounds for a new trial. First, she argued that she received a copy of the death certificate, which she unsuccessfully tried to obtain through discovery motions, and thus sought a new trial based upon newly discovered evidence. Second, her supplemental motion argued that the county attorney suppressed exculpatory and impeachment evidence by misrepresenting the existence of evidence during a discovery hearing. Thus, Thompson sought a new trial based upon prosecutorial misconduct.

Thompson's motion for a new trial was filed on May 24, 1993, and its supplement filed on November 23, 1993. A jury found Thompson guilty of first degree murder on August 19, 1992. In relevant part, Neb. Rev. Stat. § 29-2103 (Reissue 1989) states:

> The application for a new trial shall be by motion upon

> written grounds, and may be filed either within or without the term at which the verdict is rendered. It shall, except for the cause of newly discovered evidence material for the party applying, which he could not with reasonable diligence have discovered and produced at the trial, be filed within ten days after the verdict was rendered unless unavoidably prevented.

Thompson does not assign as error the court's decision that the death certificate was not newly discovered evidence. Thompson asserts only that the district court erred in not ruling that the county attorney suppressed potentially exculpatory and impeachment evidence. This court interpreted the term "unavoidably prevented" in § 29-2103 as referring to circumstances beyond the control of the party filing the motion for new trial. *State v. Hawkman*, 198 Neb. 578, 254 N.W.2d 90 (1977). The law requires diligence, and mere neglect will not entitle a party to relief. *Id.*

In Thompson's direct appeal, we refused to address her previous untimely motion for a new trial. *Thompson I.* Today, as in her direct appeal, Thompson did not show in the trial court grounds for being "unavoidably prevented" from filing a timely motion for a new trial. Defense counsel had an interest in a coroner's report, as evidenced by pretrial motions. As ruled by the district court, the one coroner document that defense counsel could obtain without any discovery motions was the death certificate on file at the Bureau of Vital Statistics. The failure to request a copy of the death certificate represents neglect, rather than a circumstance beyond Thompson's control. Thus, if the present action is viewed as an appeal regarding alleged prosecutorial misconduct, Thompson's failure to file within the constraints of the mandatory language in § 29-2103 precludes appellate review. As a result, we need not consider this untimely motion. See *State v. Atwater*, 245 Neb. 746, 515 N.W.2d 431 (1994) (refused to address untimely motion for a new trial but addressed the issue of suppression of material evidence in review of a motion for postconviction relief).

However, a claim of suppression of material evidence favorable to the accused, such as Thompson's, generally

appears before appellate courts in the form of an action for postconviction relief, such as a habeas corpus petition, as opposed to a motion for a new trial. See, e.g., *United States v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985); *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); *Snell v. Lockhart*, 14 F.3d 1289 (8th Cir. 1994); *Patterson v. Black*, 791 F.2d 107 (8th Cir. 1986), *cert. denied* 479 U.S. 1036, 107 S. Ct. 890, 93 L. Ed. 2d 842 (1987); *Ogden v. Wolff*, 522 F.2d 816 (8th Cir. 1975), *cert. denied* 427 U.S. 911, 96 S. Ct. 3198, 49 L. Ed. 2d 1203 (1976); *Williams v. Wolff*, 473 F.2d 1049 (8th Cir. 1973); *State v. Atwater, supra*. Thus, we may address the merits of this appeal out of concern for judicial economy because Thompson could bring this claim again in an action for postconviction relief.

Thompson relies on the Supreme Court's holding in *United States v. Bagley, supra*. In *Bagley*, the government responded to a discovery request by disclosing affidavits from key witnesses attesting that their statements were given without any consideration from the government. Approximately 3 years after sentencing, Bagley discovered that the witnesses in question were paid $300 for providing information, assisting, and testifying in regard to the government's actions against Bagley. Bagley subsequently filed a federal habeas corpus motion. The Supreme Court rejected any distinctions between exculpatory and impeachment evidence. The Court held that the prosecutor need not deliver the entire case file to defense counsel, but must disclose evidence favorable to the defendant that, if suppressed, would deprive the defendant of a fair trial. The Court also held that regardless of whether the defendant made a discovery request, constitutional error exists if the government failed to disclose evidence favorable to the accused that is probably sufficient to undermine confidence in the outcome. As to the merits of the case, the Court found that the misleading affidavits affected the ability to impeach key witnesses. Thus, the Court remanded the cause to determine whether disclosure of the government's inducement to obtain testimony would affect the trial result.

Thompson argues that, similar to *Bagley*, the county attorney misled her by denying the existence of documents

relating to his capacity as a coroner. Thompson claims in her brief that the county attorney's alleged misrepresentation led her counsel to believe that documents outside of the pathologist's autopsy report did not exist, and that is why defense counsel did not seek out Frank's death certificate. Even assuming the death certificate has any material value, all counsel had to do was request the certificate from the Bureau of Vital Statistics, which could have been accomplished approximately 1 year before trial. Furthermore, under *Bagley*, what must be addressed is not solely the county attorney's failure to disclose the death certificate, but whether the death certificate could have resulted in a different outcome.

Thompson states that she would have offered to use the death certificate as impeachment evidence against Dr. Randall, a key witness in the government's prosecution. In *State v. Brown*, 214 Neb. 665, 335 N.W.2d 542 (1983), the convicted robber filed a motion for a new trial, within 10 days of the verdict, alleging that the government withheld a telephone conversation with a psychologist who described the victim as a pathological liar and withheld a conference with a pathologist who found the victim's injuries inconsistent with the victim's description of the assault. This court held that while matters affecting the credibility of a major witness are material, it was not prejudicial for the State to withhold the commentary of a nonexamining psychologist. As to the pathologist, however, we held that a pathologist's opinion casting doubt on a key witness is material and must be disclosed to the accused. In the present case, however, the death certificate is a form completed by a county attorney after consulting sources, not the opinion of a pathologist. Thus, the death certificate is more analogous to the nonexamining psychologist's opinion which did not call for disclosure.

Thompson relies on *Giglio v. United States*, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972), in which the Supreme Court held that the government's failure to disclose an understanding or agreement not to prosecute a key witness was material because defense counsel could use the information to attack the witness' credibility. Thompson argues that *Giglio* supports her contention that the death certificate is material impeachment

evidence against Dr. Randall. In *Giglio*, however, the Court also held that the government's case depended entirely on the witness in question. Thompson's argument wrongly assumes that her conviction rested entirely upon the time of death. The record indicated that Thompson fired three shots downward toward the floor, contradicting her testimony that she fired six consecutive shots at a standing Frank. The trajectory of the shots indicated that Thompson fired the shots from the dining room, contradicting her testimony that she fired the shots from next to the computer. The record indicated that authorities observed blood only where Frank was found lying, contradicting Thompson's testimony that Frank moved around after being shot. Thompson's argument ignores the letters to her son that showed the malice she felt toward Frank, her purchase of ammunition and target practice just prior to the killing, and her use of a large-caliber handgun when she had Mace and a small-caliber handgun in her house. See *Thompson I*. In her direct appeal, we held:

> Based upon all the direct and circumstantial evidence in this case, the jury could have found beyond a reasonable doubt that the defendant's words and conduct in the days and hours before the shooting, as well as the circumstances surrounding the shooting itself, were sufficient to prove that the defendant intended to kill Frank and that she did so with deliberate and premeditated malice . . . .

244 Neb. at 403, 507 N.W.2d at 272. Thus, when we consider the entire record, it is inconceivable that a death certificate that merely noted the time interval between Thompson's call to the sheriff and Frank's pronounced death could result in a different outcome. See *Patterson v. Black*, 791 F.2d 107 (8th Cir. 1986), *cert. denied* 479 U.S. 1036, 107 S. Ct. 890, 93 L. Ed. 2d 842 (1987) (failure to disclose laboratory results despite discovery requests not material in light of other evidence on the record incriminating the defendant).

The government may not withhold impeachment evidence that is material. See, *U.S. v. Ailport*, 17 F.3d 235 (8th Cir. 1994), *cert. denied* ____ U.S. ____, 114 S. Ct. 2756, 129 L. Ed. 2d 872; *State v. Jackson*, 231 Neb. 207, 435 N.W.2d 893 (1989).

Thompson stresses the value of the time interval between onset and death noted in the death certificate. The county attorney testified that he completed the death certificate form after discussing the cause of death with Dr. Randall and consulting Dr. Randall's preliminary autopsy report, as well as records from the sheriff's office. The county attorney testified that Dr. Randall described the cause of death as two fatal wounds to the kidney and liver. The county attorney also testified that he disclosed the autopsy report to defense counsel. Furthermore, the county attorney testified that he calculated the time interval based upon when Thompson called authorities saying she shot Frank and when Dr. Pavlik pronounced Frank dead. The information used to calculate the time interval, as well as the cause of death, existed on the record from the sheriff's reports and Dr. Randall's autopsy report. Therefore, the information withheld from Thompson existed in the record through other sources. In any event, it was the work of the county attorney, not the pathologist, and was accessible through the Bureau of Vital Statistics. Thus, the time interval on the death certificate is cumulative, as well as incompetent.

In *State v. Hankins*, 232 Neb. 608, 441 N.W.2d 854 (1989), we denied the accused access to medical records which showed that a chief prosecution witness had poor memory. We held that the evidence had bearing on the witness' credibility and should have been available to the defendant. We also held, however, that the witness' memory difficulties existed on the record through other sources, making the medical records cumulative. As a result of the information's cumulative nature, a reasonable probability did not exist that disclosure could result in a different outcome.

Last, the death certificate is simply not admissible. Both parties rely on *Vanderheiden v. State*, 156 Neb. 735, 57 N.W.2d 761 (1953). In *Vanderheiden*, a jury found the defendant guilty of murdering his wife, and on direct appeal, this court affirmed the conviction of second degree murder. Vanderheiden argued that the trial court erred in refusing to admit a copy of the victim's death certificate to show the cause of death and for purposes of impeachment. This court affirmed the trial court's judgment, holding that death certificates are not admissible to

show cause of death because they are made ex parte without a hearing and without the right of cross-examination. As to offering the death certificate for impeachment of pathologists' testimony, we held that the death certificate was not admissible because the pathologists did not make the death certificate, and the certificate did not impeach the coroner who completed it.

Similar to *Vanderheiden*, Dr. Randall did not complete the death certificate, and therefore, it could not be used to impeach him. Thompson argues that the county attorney completed the certificate based upon information derived from Dr. Randall. The record indicates that the county attorney calculated the time interval based upon information from the sheriff's report, not upon a conversation with Dr. Randall. The death certificate is not admissible if offered to prove the cause of death. The death certificate is not admissible as impeachment of Dr. Randall because Dr. Randall did not make the death certificate, the certificate does not wholly reflect Dr. Randall's discussion with the county attorney, and the certificate does not conflict with Dr. Randall's testimony or the government's case against Thompson in general.

We do not condone the action of the county attorney in advising the court and the defendant that he did not prepare a coroner's report and in failing to reveal that he did in fact prepare a certificate of death. However, it is apparent that the law, Neb. Rev. Stat. § 71-605 (Reissue 1990), requires that if death occurred by unlawful means, the county attorney, within 24 hours of taking charge of the case, shall show on the death certificate the cause of death. In turn, a certificate of death shall be filed with the Bureau of Vital Statistics within 5 business days after the death, and a copy shall be available to the public, pursuant to Neb. Rev. Stat. § 71-612 (Reissue 1990). That certificate was available to Thompson at any time after August 23, 1991.

However, for the reasons we have set out above, we determine that the death certificate could not have furnished independent evidence of the time or cause of death and would not have been available for impeachment purposes under the circumstances. The certificate would not have created a reasonable doubt of guilt that otherwise did not exist. See *State*

v. Atwater, 245 Neb. 746, 515 N.W.2d 431 (1994). Accordingly, we affirm the judgment of the trial court in denying the motion for a new trial and the supplement to the motion for a new trial.

AFFIRMED.

CAPORALE, J., not participating.

LEONARD R. DEMOOR, APPELLEE, V. KAREN E. DEMOOR, APPELLANT, AND NORWEST BANK, N.A., FORMERLY KNOWN AS FIRST NATIONAL BANK, ET AL., APPELLEES.

523 N.W.2d 361

Filed November 4, 1994. No. S-93-109.

1. **Mortgages: Real Estate: Foreclosure: Equity.** A proceeding to foreclose a real estate mortgage is an equitable action.
2. **Equity: Appeal and Error.** When an equity case is appealed from the district court, the appellate court tries factual issues de novo on the record and reaches a conclusion independent of the findings of the trial court. When the evidence conflicts, however, the appellate court may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.

Appeal from the District Court for Adams County: BERNARD SPRAGUE, Judge. Affirmed as modified.

Brenda L. McCrady for appellant.

Stephen A. Scherr, of Whelan & Scherr, P.C., for appellee Leonard DeMoor.

HASTINGS, C.J., WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ., and BOSLAUGH, J., Retired.

BOSLAUGH, J., Retired.

Karen E. DeMoor (the defendant) appeals from the judgment of the district court foreclosing a third real estate mortgage given by the defendant to the plaintiff, Leonard R. DeMoor, the defendant's former husband. The foreclosure was allowed because the defendant was in default under the terms of the promissory note and third mortgage she gave the plaintiff.

The marriage of the parties was dissolved in 1977. In a

property settlement agreement entered into between the parties, the defendant was granted the residence of the parties located at 402 E. 7th Street, in Hastings, Nebraska, subject to first and second mortgages in favor of Norwest Bank Nebraska, and a third mortgage in the sum of $15,260 in favor of the plaintiff. The $15,260 represented the plaintiff's share in the equity of the real estate, which was $3,060, as well as his assumption of the payments of the second mortgage on the real estate in the amount of $12,200. The settlement agreement provided that the mortgage given to the plaintiff would be due and payable when the property was sold, when defendant remarried, or when the parties' youngest child attained the age of majority on August 2, 1988, whichever occurred first.

After the decree of dissolution was entered on June 29, 1977, the defendant executed a promissory note and a third real estate mortgage providing that the defendant would pay to the plaintiff $15,260 with interest at 5 percent per annum from July 1. The settlement agreement and decree of dissolution had no provision concerning interest on the defendant's mortgage to the plaintiff, and the plaintiff's adding a provision regarding interest due on the note and mortgage signed by the defendant was a modification of the terms of the property settlement agreement incorporated in the decree of dissolution. The defendant testified that when she asked the plaintiff about the interest provision in the promissory note and mortgage, the plaintiff told her that the documents provided for interest for legal purposes and that he would not require the defendant to pay the interest.

In order to make some improvements on the house, the defendant gave another mortgage against the same real estate to the City of Hastings, Hastings Department of Community Development, on September 15, 1983. That mortgage and its underlying note were subject to a clause forgiving the indebtedness if the plaintiff did not transfer title in the house for 10 years.

When the parties' youngest child attained legal age on August 2, 1988, the plaintiff demanded payment of his mortgage. The plaintiff filed his petition for foreclosure on September 26.

Following a trial, the district court found the defendant in default under the terms of the promissory note and third real estate mortgage. The district court found that the defendant owed the plaintiff the principal amount of $15,260 together with interest at 5 percent per annum from July 1, 1977, through February 24, 1992, in the amount of $11,177.95, and owed the plaintiff the costs of the action in the amount of $162.95, for a total indebtedness of $26,600.90. The district court further found that Norwest Bank held a first and second lien against the real estate and that the City of Hastings was entitled to a fourth lien against the real estate. The district court ordered the real estate to be sold by the sheriff of Adams County if the amounts of the liens and the costs of the action together with interest were not paid within 20 days from the date of the decree.

In her brief, the defendant assigned as error the district court's entering a decree of foreclosure and granting the plaintiff interest on the promissory note and mortgage dated July 1, 1977. At oral argument, the parties agreed the defendant's first assignment of error is moot; therefore, this opinion concerns only the defendant's remaining assignment of error.

> A proceeding to foreclose a real estate mortgage is an equitable action. *Production Credit Assn. of the Midlands v. Schmer*, 233 Neb. 749, 448 N.W.2d 123 (1989); *First Fed. Sav. & Loan Assn. v. Thomas*, 230 Neb. 465, 432 N.W.2d 222 (1988). When an equity case is appealed from the district court, the appellate court tries factual issues de novo on the record and reaches a conclusion independent of the findings of the trial court. When the evidence conflicts, however, the appellate court may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another. *Regency Homes Assn. v. Egermayer, ante* p. 286, 498 N.W.2d 783 (1993); *Eliker v. Chief Indus., ante* p. 275, 498 N.W.2d 564 (1993).

McCook Nat. Bank v. Myers, 243 Neb. 853, 858, 503 N.W.2d 200, 204 (1993).

The defendant contends that the district court erred in awarding the plaintiff interest in the amount of 5 percent per

annum from July 1, 1977. We agree.

The evidence shows that the defendant was obligated to pay the plaintiff $15,260 upon her remarriage, the sale of the house, or the parties' youngest child attaining the age of majority on August 2, 1988, whichever occurred first. The $15,260 represented the plaintiff's share of the equity in the house, $3,060, and the amount of the second mortgage on the house, $12,200, which the plaintiff was obligated to pay under the terms of the parties' property settlement agreement and dissolution decree.

Neither the property settlement agreement nor the dissolution decree provided for interest on the $15,260 owed by the defendant. Furthermore, the plaintiff offered no testimony to contradict the defendant's assertion that the plaintiff promised he would not require the defendant to pay interest.

Since, under the terms of the parties' property settlement agreement and the dissolution decree, the defendant was obligated to pay $15,260 only upon her remarriage, the sale of the house, or the parties' youngest child attaining the age of majority, the district court erred in granting the plaintiff interest from July 1, 1977.

At the time of this foreclosure proceeding, the defendant was not in default on the first mortgage on the home, and the plaintiff was current in his payments on the second mortgage. Part of the $15,260 owed by the defendant represents the plaintiff's obligation on the second mortgage. There is nothing in the record that shows the balance owed by the plaintiff on the second mortgage.

If the house is sold at a sheriff's sale, the proceeds should be applied to pay the balance owed on the first and second mortgages before anything is applied to the third mortgage, and the defendant should be given credit for the amount paid on the second mortgage from the proceeds from the sheriff's sale.

The district court's judgment of foreclosure should be modified to eliminate the provision for interest upon the principal of the amount due the plaintiff from the defendant, and all provisions in the decree of foreclosure concerning the

lien of the City of Hastings should be deleted because that issue is moot.

The judgment is affirmed as modified.

AFFIRMED AS MODIFIED.

LONE CEDAR RANCHES, INC., A NEBRASKA CORPORATION, AND BILL HARTNELL, APPELLANTS, V. D.B. JANDEBEUR AND THE JANDEBEUR COMPANY, A NEBRASKA CORPORATION, APPELLEES.

523 N.W.2d 364

Filed November 4, 1994. No. S-93-289.

1. **Equity: Appeal and Error.** In an appeal in equity, the reviewing court tries factual questions de novo on the record.
2. **Appeal and Error.** The factual findings of the trial court in an action at law in which the jury is waived have the effect of a verdict and will not be set aside unless clearly wrong.
3. **Actions: Accounting.** An action for an accounting may under one set of circumstances find its remedy in an action at law and under another find it within the jurisdiction of equity.
4. **Declaratory Judgments.** A suit for declaratory judgment is an action sui generis and may involve questions of law or equity or both; whether a declaratory judgment action is treated as an action at law or one in equity is to be determined by the nature of the dispute.
5. **Actions: Contracts.** When the essence of a dispute sounds in contract, the action is to be treated as one at law.
6. **Accounting: Equity.** Generally, in order to be entitled to the equitable remedy of accounting, it is necessary to allege a fiduciary, trust, or confidential relationship; a complicated series of accounts; or the inadequacy of a remedy at law, the latter being the basic reason for asserting equitable jurisdiction.
7. **Accounting: Contracts.** An accounting action at law is based upon a contract, express or implied.
8. **Accounting.** For an action for a legal accounting to lie, it must appear that the defendant has received property or money not belonging to him or her, which he or she is bound to account for to the plaintiff, and that the plaintiff is the owner of such property or money.
9. **Pleadings.** The allegations of a petition establish the essential character of a cause of action and the remedy or relief it seeks and thus determine whether a particular action is one at law or in equity, unaffected by the conclusions of the pleader or what the pleader calls it.
10. **Judgments: Appeal and Error.** In an action at law tried without a jury, the findings of the district court have the effect of a verdict, the evidence must be

considered in the light most favorable to the successful party, conflicts must be resolved in favor of the successful party, and the successful party is entitled to the benefit of every inference which can reasonably be deduced from the evidence.

11. **Accord and Satisfaction: Words and Phrases.** An accord and satisfaction is a discharge of an existing indebtedness by the rendering of some performance different from that which was claimed as due and the acceptance of such substituted performance by the claimant in full satisfaction of the claim.
12. **Accord and Satisfaction.** To constitute an accord and satisfaction, there must be (1) a bona fide dispute between the parties, (2) substitute performance tendered in full satisfaction of the claim, and (3) acceptance of the tendered performance.
13. **Accord and Satisfaction: Proof.** The burden of proof to maintain an alleged accord and satisfaction is on the party seeking to enforce it.
14. **Accord and Satisfaction: Intent.** The key element of accord and satisfaction is the intent of the parties, which, although as a general rule presents a question of fact, becomes a question of law when the evidence creates no conflict as to intent.
15. **Breach of Contract: Damages.** One injured by a breach of contract is entitled to recover all one's damages, including the gains prevented as well as the losses sustained, provided the damages are reasonably certain and such as might naturally be expected to follow the breach.
16. **Damages: Proof.** While damages need not be proved with mathematical certainty, neither can they be established by evidence which is speculative and conjectural.
17. _____: _____. Loss of prospective profits may be recovered if the evidence shows with reasonable certainty both its occurrence and the extent thereof; uncertainty as to the fact of whether damages were sustained at all is fatal to recovery, but uncertainty as to amount is not if the evidence furnishes a reasonably certain factual basis for computation of the probable loss.

Appeal from the District Court for Lincoln County: DONALD E. ROWLANDS II, Judge. Affirmed.

George G. Vinton for appellants.

John A. Gale, of McCarthy, Gale & Moore, for appellees.

HASTINGS, C.J., WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ., and BOSLAUGH, J., Retired.

CAPORALE, J.

I. STATEMENT OF CASE

The plaintiffs-appellants producers, Lone Cedar Ranches, Inc., a Nebraska corporation, and Bill Hartnell, seek an accounting and damages under a farming contract with the defendants-appellees landowners, D.B. Jandebeur and The

Jandebeur Company, a Nebraska corporation. Jandebeur and The Jandebeur Company counterclaimed, seeking damages for breach in the performance of the contract and postcontract arrangements, and to have a thresher's lien filed by Hartnell declared void. The district court entered judgment in the amount of $6,125 in favor of Lone Cedar Ranches, to be offset against a judgment in the sum of $25,496.10 in favor of Jandebeur, for a net judgment in his favor of $19,371.10, and declared the thresher's lien to be void. The producers appealed, asserting, in summary, that the evidence failed to sustain the district court's findings that (1) The Jandebeur Company had no liability; (2) an accord and satisfaction had been reached by the parties as to the contract; (3) the contract had not been extended; (4) the annual accounting required by the contract had been postponed; (5) the reasonable value of the farming services performed during the postcontract period and the amount paid therefor were as determined; (6) the crop yields during the postcontract period, the values thereof, and the resulting losses were as determined; and (7) the thresher's lien was void. We, on our own motion, removed the matter from the Nebraska Court of Appeals to this court in order to regulate the caseloads of those courts and now affirm the judgment of the district court.

II. SCOPE OF REVIEW

The producers have asked that we review this matter de novo on the record. Despite the fact that in many contexts the traditional distinctions between law and equity have been abolished, whether an action is one in equity or one at law controls in determining an appellate court's scope of review. In an appeal in equity, the reviewing court tries factual questions de novo on the record. In contrast, the factual findings of the trial court in an action at law in which the jury is waived have the effect of a verdict and will not be set aside unless clearly wrong. *Waite v. A. S. Battiato Co.*, 238 Neb. 151, 469 N.W.2d 766 (1991).

An action for an accounting may under one set of circumstances find its remedy in an action at law and under another find it within the jurisdiction of equity. *Id.* A suit for

declaratory judgment is an action sui generis and may involve questions of law or equity or both; whether a declaratory judgment action is treated as an action at law or one in equity is to be determined by the nature of the dispute. *Id.*; *Jelsma v. Colonial Penn Ins. Co.*, 232 Neb. 49, 439 N.W.2d 479 (1989). When the essence of the dispute sounds in contract, the action is to be treated as one at law. *Waite, supra*; *Union Ins. Co. v. Bailey*, 234 Neb. 257, 450 N.W.2d 661 (1990).

Although the producers have asked for an accounting, we must consider the nature of the underlying dispute to determine whether this is an action at law or in equity. Generally, in order to be entitled to the equitable remedy of accounting, it is necessary to allege a fiduciary, trust, or confidential relationship; a complicated series of accounts; or the inadequacy of a remedy at law, the latter being the basic reason for asserting equitable jurisdiction. See *Trump, Inc. v. Sapp Bros. Ford Center, Inc.*, 210 Neb. 824, 317 N.W.2d 372 (1982). On the other hand, an accounting action at law is based upon a contract, express or implied. *Harmon Care Centers v. Knight*, 215 Neb. 779, 340 N.W.2d 872 (1983). For an action for a legal accounting to lie, it must appear that the defendant has received property or money not belonging to him or her, for which he or she is bound to account to the plaintiff, and that the plaintiff is the owner of such property or money. *Id.*

The controlling petition filed by the producers does not contain allegations of a fiduciary, trust, or confidential relationship; a complicated series of accounts; or the inadequacy of a remedy at law. Rather, their action sounds in contract, claiming, in part, that the landowners have received money which belongs to the producers for which the landowners must account.

It is true that the landowners sought to have the thresher's lien filed by Hartnell under the provisions of Neb. Rev. Stat. § 52-501 (Reissue 1993) declared void and that an action to foreclose a lien is grounded in equity, see *DeMoor v. DeMoor, ante* p. 765, 523 N.W.2d 361 (1994), and *McCook Nat. Bank v. Myers*, 243 Neb. 853, 503 N.W.2d 200 (1993). However, the allegations of a petition establish the essential character of a cause of action and the remedy or relief it seeks and thus

determine whether a particular action is one at law or in equity, unaffected by the conclusions of the pleader or what the pleader calls it. See *White v. Medico Life Ins. Co.*, 212 Neb. 901, 327 N.W.2d 606 (1982). Here, the landowners ask not that the lien be foreclosed, but only that it be declared void because they owe no money. Thus, the essence of the dispute in the instant case sounds in contract. The action is therefore one at law tried without a jury.

Consequently, not only do the findings of the district court have the effect of a verdict, the evidence must be considered in the light most favorable to the landowners as the successful parties, conflicts must be resolved in their favor, and they are entitled to the benefit of every inference which can reasonably be deduced from the evidence. See *White, supra*.

III. BACKGROUND

So viewed, the evidence is that Jandebeur is a resident of Oklahoma, who owned farmland in Lincoln County, Nebraska. On April 8, 1986, he and Hartnell entered into a written contract, under the terms of which Hartnell was to operate the farm and be responsible for tilling, plowing, cultivating, fertilizing, irrigating, harvesting, and maintaining the crops in a "workmanlike" manner. In addition, Hartnell was to furnish all machinery, fuel, and labor required to maintain and harvest the crops. The contract also provided that Hartnell was to plant corn and such other crops as he and Jandebeur agreed. In accordance with its terms, the contract had been extended by written notification from year to year through 1989. According to Jandebeur, The Jandebeur Company "took over [his] position" in 1989 or 1990.

Under the contract, Hartnell was to receive from Jandebeur $50 per acre for each acre of irrigated corn and 40 percent of any net profit computed as the contract specified. Shortly after signing the contract, Hartnell, without obtaining Jandebeur's required written consent, assigned it to Lone Cedar Ranches, a corporation formed by his mother.

Inasmuch as the landowners have not cross-appealed the district court's finding that the judgment in Jandebeur's favor operates only against Lone Cedar Ranches, we do not concern

ourselves with the validity of the assignment. We also assume, as the district court apparently did, that whenever Hartnell acted, he did so as an agent of Lone Cedar Ranches. And because The Jandebeur Company has not cross-appealed the district court's failure to enter judgment in its favor, neither do we concern ourselves with that matter.

In any event, Jandebeur became dissatisfied with Hartnell's performance and terminated the contract in August 1989. Jandebeur then agreed to let Hartnell work on the 1989 harvest and to compensate him for operating Jandebeur's combine, Hartnell having lost his because he was unable to make the payments.

Jandebeur also agreed to let Hartnell farm the fields in 1990 with the understanding that Hartnell would put forth his best efforts, agreeing further that Hartnell would charge a reasonable per-acre rate for each service rendered. According to Jandebeur, this postcontract arrangement was not intended to renew the prior contract, and there was no discussion concerning the sharing of postcontract profits.

IV. ANALYSIS

With that background, we turn our attention to the producers' assignments of error, setting forth such additional facts as are relevant to the resolution of each assignment.

1. Nonliability of The Jandebeur Company

The first assignment of error complains of the district court's failure to make its judgment in favor of the producers run against The Jandebeur Company as well as against Jandebeur. But because the net judgment is such that it is Lone Cedar Ranches which must pay Jandebeur, the matter is of no consequence, and we therefore need not and do not resolve it.

2. Accord and Satisfaction

In the second assignment of error, the producers assert that the district court erred in finding that there had been an accord and satisfaction of their claims arising out of the contract.

In August 1989, Jandebeur concluded that Hartnell had breached his contractual promise to properly plant and maintain the irrigated corn crop. Hartnell admitted that he

planted the corn late, failed to plant other crops the parties had agreed should be planted, and failed to properly irrigate the corn. The record also establishes that by August 1989, no profits had been distributed to Hartnell because the corn had not been sold, but, rather, had been stored in a federal program for sale at a later, more propitious time. According to Jandebeur, Hartnell acknowledged that "we blew any profit" accrued in the previous years, and they both agreed that any potential profit which had accumulated would be offset by the 1989 loss. According to Jandebeur, he told Hartnell that the contract was terminated and that he, Jandebeur, was going to pay $1,000 and "that's it."

An accord and satisfaction is a discharge of an existing indebtedness by the rendering of some performance different from that which was claimed as due and the acceptance of such substituted performance by the claimant in full satisfaction of the claim. *Mackiewicz v. J.J. & Associates*, 245 Neb. 568, 514 N.W.2d 613 (1994). To constitute an accord and satisfaction, there must be (1) a bona fide dispute between the parties, (2) substitute performance tendered in full satisfaction of the claim, and (3) acceptance of the tendered performance. *Id.* The burden of proof to maintain an alleged accord and satisfaction is on the party seeking to enforce it. *Cox v. Rippe*, 146 Neb. 309, 19 N.W.2d 514 (1945); *McKinnon v. Holden*, 85 Neb. 406, 123 N.W. 439 (1909). To meet this burden of proof, it is first to be shown that the minds of the parties to the accord and satisfaction met. See *Cox, supra*.

The key element of accord and satisfaction is the intent of the parties, which, although as a general rule presents a question of fact, becomes a question of law when the evidence creates no conflict as to intent. *Mahler v. Bellis*, 231 Neb. 161, 435 N.W.2d 661 (1989).

Although the evidence clearly establishes that Hartnell accepted the $1,000 payment from Jandebeur, the parties presented conflicting evidence as to whether they agreed that Hartnell would forgo any claim for profits in exchange for Jandebeur's waiving any claim for damages to the 1989 corn crop. Therefore, the intent of the parties was a question of fact for the trial court as the trier of fact to resolve.

There also exists evidence supporting a finding that a bona fide dispute existed, as Jandebeur had a claim for damages resulting from Hartnell's breach of the contract, and Hartnell had a claim for undistributed profits.

Thus, the district court's finding that there had been an accord and satisfaction is supported by the evidence.

However, the producers also argue that even if so, the accord and satisfaction must be set aside because of mistake or because Jandebeur misrepresented the profits. The short answer to this argument is that the producers alleged no mistake or fraud.

The record therefore fails to sustain the second assignment of error.

3. Nonextension of Contract

In the third assignment of error, the producers complain of the district court's determination that the 1986 contract was not extended to cover 1990.

But the evidence clearly supports such a finding. Not only did Jandebeur testify that the contract was not extended to cover 1990, Hartnell testified that although he had in the past received written extensions of the contract every year from 1987 through 1989, he did not receive any written extension for the year 1990. Moreover, Hartnell testified that he and Jandebeur discussed a purely fee-for-services arrangement for 1990.

Thus, this assignment of error also fails.

4. Accounting

The foregoing resolutions of the second and third assignments of error necessarily mean that the fourth assignment of error must also be resolved against the producers. The contract not having been extended and an accord and satisfaction having been reached in satisfaction of it, there is no basis for a further accounting under the contract. Because, for the grounds set forth later in subpart 6, we conclude that there were no postcontract profits, there is, for that reason, if for no other reason, no basis for any postcontract accounting.

5. Value of Postcontract Services

Next, the producers contend in the fifth assignment of error

that the evidence fails to support the trial court's determination that the value of the services rendered during the postcontract period was but $35 per acre for the 315 acres involved and that Hartnell had been paid $4,900 for those services.

Although there was countervailing evidence, there was testimony that because Jandebeur provided the combine, the fair and reasonable value of the services was $35 per acre. Jandebeur introduced into evidence canceled checks showing he had paid $4,900 for the services.

As it was for the trier of fact to determine how to evaluate the conflicting evidence, the record supports the district court's findings that the total value of the services was $11,025, toward which $4,900 had been paid, leaving a balance due of $6,125.

Consequently, the fifth assignment of error fails.

6. Value of Postcontract Crop Yields

In the sixth assignment of error, the producers complain of the district court's findings that (a) the corn yield was such that Jandebeur suffered a $25,496.10 loss, (b) Jandebeur owed nothing for the sunflowers the producers planted, and (c) Jandebeur owed nothing for the acres he set aside.

We begin this aspect of our analysis by recalling that one injured by a breach of contract is entitled to recover all one's damages, including the gains prevented as well as the losses sustained, provided the damages are reasonably certain and such as might naturally be expected to follow the breach. *Katskee v. Nevada Bob's Golf of Neb.*, 238 Neb. 654, 472 N.W.2d 372 (1991); *Buell, Winter, Mousel & Assoc. v. Olmsted & Perry*, 227 Neb. 770, 420 N.W.2d 280 (1988). While it is true that such damages need not be proved with mathematical certainty, neither can they be established by evidence which is speculative and conjectural. *Katskee, supra*; *Buell, Winter, Mousel & Assoc., supra*. Loss of prospective profits may be recovered if the evidence shows with reasonable certainty both its occurrence and the extent thereof. Uncertainty as to the fact of whether damages were sustained at all is fatal to recovery, but uncertainty as to amount is not if the evidence furnishes a reasonably certain factual basis for computation of the probable loss. *Id.*

(a) Corn Yield

Although Hartnell testified he could not irrigate optimally during the postcontract period because of a program requiring the discontinuance of electricity use during peak periods, there is evidence not only that the producers did not irrigate as they could and should have, but that they planted the corn late, did not chemically treat it in time, and tasseled it later than usual.

There is also evidence that as a result of the poor performance by the producers, the crop produced at least $24,186.50 less than it should have.

(b) Sunflower Crop

Hartnell testified that he planted approximately 1,000 pounds per acre of sunflowers during the postcontract period. However, there was independent testimony that the sunflowers were "quite short" and "seemed quite lacking" and that "there was a lot of room in between the plants." Jandebeur testified that the sunflower crop was "just left to go to weeds" and was so poor that Hartnell made no effort to combine it.

(c) Set Aside

Jandebeur testified that he was required to have some acres "set aside" to participate in a government program, being obligated to "keep the weeds down" and maintain a cover crop. However, Hartnell never planted anything or otherwise took care of the set-aside acres.

(d) Resolution

Under this state of the record, it cannot be said the district court erred in finding as it did with regard to these issues, and, thus, the sixth assignment of error fails as well.

7. Voidness of Lien

Next, the producers assert the district court was mistaken when it ruled that the thresher's lien Hartnell filed was void as a matter of law.

Section 52-501 provides in relevant part:

> The owner or operator of any threshing machine or combine used in threshing, combining, or hulling grain or seed . . . shall have and hold a lien upon such grain, seed, or corn which he or she shall thresh, combine, hull, pick,

> husk, or shell with such machine or machines to secure the payment to him or her by the owner of such grain, seed, or corn of such charges for such threshing, combining, hulling, picking, husking, or shelling as may be agreed upon or, if no charges are agreed upon, for such charges as may be reasonable for such threshing, combining, hulling, picking, husking, or shelling.

Thus, either an owner or an operator of a combine could hold a lien to secure payment for unpaid services related to combining. However, Jandebeur testified that Hartnell did not participate in the harvest to the extent that he was owed any compensation. Unfortunately, as Jandebeur also testified that he and Hartnell combined for other farmers with whom Hartnell had contracted, it is unclear whether Jandebeur was referring to the operation of the combine for his own corn crop or the harvest of a third party's crop. But any claim the producers had for unpaid services during the postcontract period was offset by the judgment against Lone Cedar Ranches for the value of the lost yield. Consequently, neither of the producers could have a claim on any grain or the proceeds therefrom. The lien is, as the district court found, void.

As a consequence, the seventh and last assignment of error fails.

V. JUDGMENT

The record failing to sustain any of the assignments of error, the judgment of the district court is, as first noted in part I above, affirmed.

AFFIRMED.

BOBBIE J. HARVEY AND ROBERTA H. HARVEY, APPELLEES, V. METROPOLITAN UTILITIES DISTRICT OF OMAHA, A MUNICIPAL CORPORATION, APPELLANT.

523 N.W.2d 372

Filed November 4, 1994. No. S-93-310.

1. **Political Subdivisions Tort Claims Act: Appeal and Error.** A district court's factual findings in a case brought under the Political Subdivisions Tort Claims Act will not be set aside unless such findings are clearly incorrect.
2. _____: _____. In a review of a bench trial under the Political Subdivisions Tort Claims Act, an appellate court must consider the evidence in the light most favorable to the successful party, resolving any conflicts in the evidence in favor of that party and giving to that party the benefit of all reasonable inferences that can be deduced from the evidence.
3. **Negligence.** In order that the doctrine of res ipsa loquitur may be invoked, it must be shown that the occurrence is one which would not, in the ordinary course of things, happen in the absence of negligence; that the instrumentality which produces the occurrence is under the exclusive control and management of the alleged wrongdoer; and that there is an absence of explanation by the alleged wrongdoer.
4. _____. In certain settings, strict exclusive control is not required and res ipsa loquitur will be applied to the party who had the last opportunity to affect an instrumentality which then passed out of its control but was not changed before the accident.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Affirmed.

Daniel G. Crouchley for appellant.

David L. Welch, of Gaines, Mullen, Pansing & Hogan, for appellees.

HASTINGS, C.J., WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ., and BOSLAUGH, J., Retired.

WRIGHT, J.

This action was brought pursuant to the Political Subdivisions Tort Claims Act. Bobbie J. Harvey and Roberta H. Harvey asserted negligence on the part of Metropolitan Utilities District of Omaha (MUD), relying on the doctrine of res ipsa loquitur. The Douglas County District Court found that MUD's negligence was the proximate cause of explosions and a fire at the Harveys' residence and that MUD's negligence

caused the Harveys' loss of real and personal property. MUD appeals.

SCOPE OF REVIEW

A district court's factual findings in a case brought under the Political Subdivisions Tort Claims Act will not be set aside unless such findings are clearly incorrect. *Mix v. City of Lincoln*, 244 Neb. 561, 508 N.W.2d 549 (1993). In a review of a bench trial under the Political Subdivisions Tort Claims Act, an appellate court must consider the evidence in the light most favorable to the successful party, resolving any conflicts in the evidence in favor of that party and giving to that party the benefit of all reasonable inferences that can be deduced from the evidence. *Stewart v. City of Omaha*, 242 Neb. 240, 494 N.W.2d 130 (1993).

FACTS

On October 3, 1989, the Harveys owned a house which was provided natural gas service by MUD. Roberta Harvey called MUD and asked to have a gas meter in the northeast corner of the basement of the residence replaced. Within hours after the gas meter was installed, Bobbie Harvey noticed there was no hot water. He discovered that the security valve on the gas meter had closed and stopped the flow of gas from entering the residence, and he reset the security valve. On October 4, the security valve closed again, and Roberta Harvey notified MUD. On the same day, an MUD employee reset the security valve and relit the gas appliances. No evidence was provided to show that the gas meter was touched between that time and November 29, the date of the fire at the Harveys' residence.

On November 29, 1989, at approximately 7:30 p.m., Roberta Harvey opened her front door and felt or heard a rush of air that she described as a "whoosh." She made her way to the midpoint of the basement stairs to locate the cause of the turbulent air, and she observed a glow under the furnace room door which she determined to be a fire. As she retreated up the stairs, the wall abutting the furnace room blew across the stairway behind her. From the top of the stairs, she saw blue and red flames in the basement. After leaving her residence to go to a neighbor's, she heard a "boom" emanate from her residence.

The fire department responded quickly, but firefighters had difficulty extinguishing the fire, which was "gas fed." The utilities had to be turned off to gain control of the fire. The residence was burned beyond repair, and the contents were either damaged or destroyed.

On December 7, 1989, three tests were conducted which determined that there was no gas leak leading to the gas meter and no leak running from the meter downstream to the Harveys' appliances. The third test showed numerous leaks within the gas meter itself. The district court found that

> [t]he leakage could have been caused by destruction of the gaskets in the meter and security valve area of the assembly during the fire, or the gaskets could have been in disrepair or in one case not utilized prior to the fire which could have been the cause of the gas leak and eventual explosion. Further, the leakage could have initially been caused by cross-threading the meter to the piping, all of which was owned by MUD.

At trial, experts testified as to the cause of the fire. Kenneth Ward had participated in MUD's testing of the gas equipment in the house and had taken photographs at the house. Based on his investigation, experience, and training, Ward stated that the fire was caused by a gas leak in the area of the gas meter. James Belina had examined the gas pipes and other gas equipment and observed tests conducted on the equipment. He concluded that the fire was initiated by a gas leak in the area of the gas meter. Donald Blocker, an MUD claims representative and investigator, participated in the examinations completed by Ward and Belina, but Blocker was of the opinion that there was no gas leak in the Harveys' basement. LaVerne Rinehart, a retired deputy fire marshal, based his opinion primarily upon photographs taken at the scene and testified that the fire did not start in the corner of the basement in which the gas meter was located. John Freeman, Jr., an engineer who testified on MUD's behalf, opined that there was no gas leak in the Harveys' residence before the fire. Freeman had not examined the site of the fire, but had completed tests on a meter similar to the one in the Harveys' basement. No evidence of any specific acts of negligence was offered by either the Harveys or MUD.

The district court found that the origin of the explosions and fire was a natural gas leak emanating from some part of MUD's gas meter assembly and that the gas meter assembly was under the exclusive control and management of MUD. The court held that MUD's exclusive control was not defeated by the fact that the gas meter assembly was on the Harveys' premises and found that although the Harveys reset the security valve, it was clear that an MUD employee reset the security valve and relit and cycled the Harveys' appliances the following day. In finding that the resetting of the security valve by the Harveys did not defeat their reliance upon the doctrine of res ipsa loquitur, the court relied upon *Asher v. Coca Cola Bottling Co.*, 172 Neb. 855, 112 N.W.2d 252 (1961), for the proposition that some control exercised by a party other than the defendant can be exerted over an instrumentality and the doctrine of res ipsa loquitur is not thereby defeated. The court concluded that MUD's negligence was the proximate cause of the explosions and fire and the Harveys' loss of real and personal property.

ASSIGNMENTS OF ERROR

MUD claims that the district court erred (1) in relying upon an inference based upon an inference as the basis for circumstantial proof of the cause of the explosions and fire, (2) in relying upon inferences for proof of the cause of the explosions and fire and pyramiding the added inference supplied by the application of the doctrine of res ipsa loquitur, and (3) in misapplying the doctrine of res ipsa loquitur by finding that the gas meter assembly in the Harveys' basement was wholly and exclusively under the possession and control or management of MUD and in misapplying the rule of circumstantial evidence as the basis of proof of the cause of the explosions and fire.

ANALYSIS

The doctrine of res ipsa loquitur is not a matter of substantive law, but, as a form of circumstantial evidence, is a procedural matter. *Anderson v. Service Merchandise Co.*, 240 Neb. 873, 485 N.W.2d 170 (1992). When res ipsa loquitur is applied, an inference of a defendant's negligence exists for submission to the fact finder, which may accept or reject the

inference in the factual determination of whether the defendant is negligent. *Brown v. Scrivner, Inc.*, 241 Neb. 286, 488 N.W.2d 17 (1992).

MUD argues that the district court erred in relying upon an inference based upon an inference as the basis for circumstantial proof of the cause of the explosions and fire, thus pyramiding the added inference supplied by the application of the doctrine of res ipsa loquitur. MUD's challenges are in essence an attack on the court's resolution of the credibility issues. The district court had before it the testimony of Roberta Harvey as to the events of November 29, 1989. The court reviewed the evidence of the tests done on the gas meter after the fire and received testimony that the fire was "gas fed" at the time the firefighters arrived. The court also considered the testimony of five experts regarding the cause of the fire.

The district court found that the evidence adduced by the Harveys as to the proximate cause and origin of the fire was more credible than that adduced by MUD. The court found that MUD's experts had differing opinions regarding the cause of the explosions and that one defense witness could not relate with certainty what he had relied on to form his opinion. The court concluded that the credible evidence showed that the origin of the explosions and fire was a gas leak emanating from some part of MUD's gas meter assembly. There was sufficient evidence for the court to determine that MUD's negligence was the proximate cause of the explosions and fire and directly caused the Harveys' loss of real and personal property.

We find that the district court had sufficient evidence to determine that the fire was started by gas explosions caused by a leak within the gas meter. In a review of a bench trial under the Political Subdivisions Tort Claims Act, an appellate court must consider the evidence in the light most favorable to the successful party, resolving any conflicts in the evidence in favor of that party and giving to that party the benefit of all reasonable inferences that can be deduced from the evidence. *Stewart v. City of Omaha*, 242 Neb. 240, 494 N.W.2d 130 (1993). Giving the Harveys the benefit of all reasonable inferences, we find no error in this determination made by the

district court.

MUD also argues that the district court erred in applying the doctrine of res ipsa loquitur in this case. In order that res ipsa loquitur may be invoked, it must be shown that the occurrence is one which would not, in the ordinary course of things, happen in the absence of negligence; that the instrumentality which produces the occurrence is under the exclusive control and management of the alleged wrongdoer; and that there is an absence of explanation by the alleged wrongdoer. See *Anderson, supra*. Absent some reasonable explanation for the gas leak, which the district court found emanated from MUD's gas meter assembly, the court was not clearly wrong in applying the doctrine of res ipsa loquitur to this case and in finding that the occurrence was one which does not ordinarily occur in the absence of negligence. Thus, we determine that the first requirement of res ipsa loquitur has been satisfied.

The second requirement is that the instrumentality which produces the occurrence is under the exclusive control and management of the alleged wrongdoer. MUD challenges the district court's finding that the gas meter was under MUD's exclusive control at the time of the fire. In certain settings, strict exclusive control is not required and res ipsa loquitur will be applied to the party who had the last opportunity to affect an instrumentality which then passed out of its control but was not changed before the accident. In *Asher v. Coca Cola Bottling Co.*, 172 Neb. 855, 112 N.W.2d 252 (1961), the plaintiff was injured when he discovered a dead mouse in the bottle of cola he was drinking. The defendant had bottled the cola, but it had been in the possession and control of a cafe for some time before the incident. The court did not require exclusive control for res ipsa loquitur to apply, but, instead, required that the plaintiff prove either that there was no reasonable opportunity for tampering or that no actual tampering with the instrumentality occurred from the time the defendant controlled it until the time of the injury. In the present case, the district court relied upon *Asher* to support its holding that MUD had exclusive control of the gas meter.

It is undisputed that MUD owned the gas meter and assumed the duty to keep the gas meter assembly in good repair. MUD

reserved exclusively to itself the right to set the meters, and the evidence showed that an MUD employee was the last person to have touched the gas meter. A natural gas company has a heightened legal duty based on the dangerous nature of its product. The gas in the pipe belonged to MUD, and as long as it remained MUD's property, MUD was under the duty to use proper care to protect the Harveys from injury caused by the dangerous propensities of the gas. See *Daugherty v. Nebraska Nat. Gas Co.*, 173 Neb. 30, 112 N.W.2d 790 (1961). In *Daugherty*, we refused to allow the gas company to escape liability for a gas explosion in spite of the fact that the line that exploded was owned by the homeowner. We based this holding in part on the fact that the defendant had carried out repairs on the line that eventually exploded. We held that the gas company had a continuing duty to exercise proper care to prevent injury from escaping gas.

In the present case, MUD had the primary responsibility for maintaining the gas meter. MUD was the last entity to have worked with the gas meter. The evidence established that MUD owned and had responsibility for the gas meter assembly and that no one had touched the meter after the MUD employee's visit on October 4, 1989. The district court was not clearly wrong in finding that MUD had exclusive control of the gas meter at the time of the fire. Thus, the second requirement has been satisfied.

The third requirement is an absence of explanation by the alleged wrongdoer. MUD only offered evidence intended to establish a cause for the fire other than a natural gas leak. The trier of fact did not accept MUD's alternate explanation of causation. A district court's factual findings in a case brought under the Political Subdivisions Tort Claims Act will not be set aside unless such findings are clearly incorrect. *Mix v. City of Lincoln*, 244 Neb. 561, 508 N.W.2d 549 (1993). Accepting that the fire was caused by a gas leak, we find that MUD offered no evidence which would explain the occurrence. There is an absence of explanation by the alleged wrongdoer, and the third requirement has been satisfied.

The district court's factual findings are not clearly incorrect. The court was justified in applying the doctrine of res ipsa

loquitur and finding negligence on the part of MUD. The judgment of the district court is affirmed.

AFFIRMED.

MAX HOLMAN AND ROSE M. HOLMAN, APPELLEES, V. PAPIO-MISSOURI RIVER NATURAL RESOURCES DISTRICT, APPELLANT.

523 N.W.2d 510

Filed November 4, 1994. No. S-93-407.

1. **Eminent Domain: Verdicts: Appeal and Error.** A condemnation action is reviewed as an action at law, in connection with which a verdict will not be disturbed unless it is clearly wrong.
2. **Verdicts: Appeal and Error.** In determining the sufficiency of the evidence to sustain a verdict, the evidence must be considered most favorably to the successful party, every controverted fact must be resolved in the successful party's favor, and the successful party is entitled to the benefit of any inferences reasonably deducible from the evidence.
3. **Trial: Records.** It is not the trial court's prerogative to decide what the trial record shall be; upon request, a litigant is entitled to a verbatim record of anything and everything which is said by anyone in the course of judicial proceedings; it is the duty of the court reporter to make such a record, and it is the obligation of the trial court to see to it that the reporter accurately fulfills that duty.
4. **Expert Witnesses.** Where an expert's opinion does not have a sound and reasonable basis such that the expert is able to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture, the opinion should be stricken.
5. **Expert Witnesses: Appeal and Error.** An appellate court is not a superexpert and will not lay down categorically which factors and principles an expert may or may not consider. Such matters go to the weight and credibility of the opinion itself and not to its admissibility.
6. **Expert Witnesses.** Where, for other than bad faith motives, the testimony of the same expert is conflicting, it rests with the trier of fact to resolve the conflict.
7. **Taxation: Evidence: Eminent Domain.** The tax value of land is not admissible as direct evidence in a condemnation case.
8. **Trial: Evidence.** If an exhibit is only admissible in part, it is incumbent on the offeror to select and offer only the admissible part; if one offers both the admissible and inadmissible parts, the trial court may reject the entire offer.

9. **Directed Verdict: Waiver: Appeal and Error.** A defendant who moves for directed verdict at the close of the plaintiff's evidence, and upon overruling of such motion proceeds with trial, waives any error on the motion for directed verdict.
10. **Directed Verdict: Evidence.** In order to sustain a motion for directed verdict, the trial court must resolve the controversy as a matter of law and is to do so only when the facts are such that reasonable minds can draw only one conclusion; in considering the evidence for the purposes of a directed verdict motion, the party against whom the motion is made is entitled to have the benefit of every inference which can reasonably be drawn from the evidence, and the case may not be decided as a matter of law if there is any evidence in favor of the party against whom the motion is made.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Affirmed.

Paul F. Peters, of Schmid, Mooney & Frederick, for appellant.

Dixon G. Adams for appellees.

HASTINGS, C.J., WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ., and BOSLAUGH, J., Retired.

CAPORALE, J.

I. STATEMENT OF CASE

After our determination in *Holman v. Papio Nat. Resources Dist.*, 228 Neb. 94, 421 N.W.2d 430 (1988) (*Holman I*), that the Papio-Missouri River Natural Resources District, the defendant-appellant herein, was to be enjoined from obstructing a natural drainage ditch along land owned by the plaintiffs-appellees in this case, Max Holman and Rose M. Holman, the district condemned an easement over and across the land. Being dissatisfied with the $21,500 award of the county court appraisers, the Holmans appealed to the district court. In seeking to overturn that court's judgment on the verdict in the sum of $95,000, the district appealed to the Nebraska Court of Appeals, asserting that the district court, hereinafter referred to as the trial court, erred in (1) refusing to strike certain evidence, (2) refusing to receive certain evidence, (3) failing to direct a verdict in the district's favor at the close of the Holmans' case, and (4) calculating the interest due on the judgment. We removed the matter to this court in order to

regulate the caseloads of the two appellate courts. We now affirm.

II. SCOPE OF REVIEW

A condemnation action is reviewed as an action at law, in connection with which a verdict will not be disturbed unless it is clearly wrong. See *Lincoln Branch, Inc. v. City of Lincoln*, 245 Neb. 272, 512 N.W.2d 379 (1994). Moreover, in determining the sufficiency of the evidence to sustain a verdict, the evidence must be considered most favorably to the successful party, every controverted fact must be resolved in the successful party's favor, and the successful party is entitled to the benefit of any inferences reasonably deducible from the evidence. See *id.*

III. BACKGROUND

While the district has made no complaint in this regard, we nonetheless begin our recitation of the record by observing that at times the trial court curtailed the district's effort to make the record it wished to make. If there was ever any doubt, it should by now be abundantly clear to all that it is not the trial court's prerogative to decide what the trial record shall be. Upon request, a litigant is entitled to a verbatim record of anything and everything which is said by anyone in the course of judicial proceedings; it is the duty of the court reporter to make such a record, and it is the obligation of the trial court to see to it that the reporter accurately fulfills that duty. See, *In re Complaint Against Staley*, 241 Neb. 152, 486 N.W.2d 886 (1992); *State v. Bradley*, 236 Neb. 371, 461 N.W.2d 524 (1990); *Kennedy v. Kennedy*, 221 Neb. 724, 380 N.W.2d 300 (1986); Neb. Ct. R. of Official Ct. Rptrs. 4 (rev. 1992).

That having been noted, the record viewed most favorably to the Holmans establishes that their land consists of 44 acres bounded on the south by the Platte River, on the east by U.S. Highway 73-75, and on the north and west by a natural drainage ditch which flows east through a culvert under the highway.

By the time of *Holman I*, the district had placed a floodgate at the west end of the culvert adjacent to the northeast corner of the Holmans' land. The easement it later took gives the district

the right to close the floodgate if both the Platte River level, as measured at either of two designated points, and water in the culvert reach a described level. The district must reopen the floodgate when the water at both of the designated points on the river subsides to a specified level.

The land is lakefront property in the sense that two lakes were created when a former occupier mined the land for its sand and gravel. The boundaries of the property were diked with the removed topsoil, and according to Max Holman, who first became acquainted with the land in the 1930's, the property had not flooded until 1984, when the district closed its floodgate.

Robert E. Dreessen, a licensed professional civil engineer with 30 years' experience in construction of drainage structures affecting highways and with water runoff, soil mechanics, percolation of water, and storm sewers and similar systems, and who had worked on pumped-out gravel pits which were turned into housing subdivisions, testified that in his opinion the closing of the district's floodgate under the conditions specified in the easement would cause a significant amount of water to be deposited and accumulate upon the Holmans' land. It was also Dreessen's opinion that because of the increased likelihood of periodic flooding of the Holmans' land, the feasibility for the land's development as lakefront residential property under two proposals he made before the district's taking of the easement was "diminished," "probably not . . . feasible," "seriously jeopardized," and "not feasible without additional economic analysis."

Mark Rubin is a licensed real estate salesperson and broker who has developed land, serves on the Sarpy County Planning Commission, and has served as its chairperson. In his opinion, the highest and best use of the Holmans' land was that of lakefront residential use. Relying on Dreessen's opinions that a significant accumulation of water would result from the easement and that the two proposals Dreessen had made for lakefront residential use were infeasible, the before taking value of $436,750 for the property had been reduced to $30,000, a difference of $406,750.

Michael Yudelson is a law school graduate who spent 20 years with the estate tax division of the Internal Revenue

Service, where he was required to value all types of property, including real estate, as well as study the effect on values of restrictions such as easements. He has also taught real estate valuation. Upon retirement from the Internal Revenue Service, he became affiliated with a shopping center developer, where he is concerned with land acquisitions and in connection with which he is called upon to value real estate. Relying on Dreessen's opinion that the easement made development infeasible, it was Yudelson's opinion that the $413,000 before taking value of the real estate had been reduced by the easement to $130,000, a difference of $283,000.

The district's evidence was that prior to the sandpits being dug, the Holmans' land flooded every time the river came up, almost every year. The terms of the easement are such that the floodgate can be closed only when a Platte River flood is in progress. The Holmans' land was exposed to flooding before the district's taking of the easement because of percolation of water from the river. As a result, any water entering upon the Holmans' property due to closing the floodgate would be insignificant. According to the district's evidence, the $380,000 value of the land before the taking was unaffected by the easement.

IV. ANALYSIS

With that background, we turn to the district's assignments of error, providing such additional facts as are required for the resolution of each issue.

1. Refusal to Strike Evidence

In connection with its first assignment of error, the district urges that Dreessen's opinion that the closing of the floodgate would result in "significant accumulation" of water on the Holmans' land should have been stricken pursuant to its motion. The district urges that the opinion was based on nothing more than speculation and conjecture in that Dreessen did not empirically account for other sources of water inflow into the property, namely percolation resulting from a hydrological balance between the property and the Platte River. The district further contends that because of the speculative nature of Dreessen's opinion that there would be significant

water accumulation on the Holmans' property resulting from the closing of the floodgate, there was no basis for his opinion concerning the effect on the developability of the property and thus no basis for the opinions of Rubin and Yudelson concerning the diminution in the value of the property. Furthermore, the district contends that there was an insufficient basis for the opinions of Rubin and Yudelson, since their opinions were based on Dreessen's vacillating characterization of the effect of the easement on the developability of the land.

(a) Dreessen's Opinions

Dreessen acknowledged that there was percolation, that is, that as "long as the water surface of the Platte is higher than the water surface of the lake, there will be some movement of water through the sand toward the lake," and that the ultimate effect would be a rise in the level of the lakes on the Holmans' land. It was his view, however, that the water in the aquifer moves much slower than flowing surface water. Although Dreessen would not attempt to estimate the amount of water that would percolate under the dikes during a flood, he did estimate that percolation would be slow in the area of the culvert.

With the floodgate closed, the water level in the drainage ditch next to the floodgate would be higher than with the floodgate open and would tend to rise to the level of the elevation of the water upstream to the west where the ditch runs into the river. The water going over the dike would be higher than the floodwater, in that it would be equal to the floodwater at the northwest corner of the property where the drainage begins from the river. Thus, the gradient down from the west side of the property to the east would be nullified by the damming up of the water.

It is true that where an expert's opinion does not have a sound and reasonable basis such that the expert is able to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture, the opinion should be stricken. See *Clearwater Corp. v. City of Lincoln*, 202 Neb. 796, 277 N.W.2d 236 (1979), *appeal after remand* 207 Neb. 750, 301 N.W.2d 328 (1981). On the other hand, an appellate court is not a

superexpert and will not lay down categorically which factors and principles an expert may or may not consider. Such matters go to the weight and credibility of the opinion itself and not to its admissibility. *Palmer v. Forney*, 230 Neb. 1, 429 N.W.2d 712 (1988).

The dispute here is not over whether Dreessen had the appropriate facts in hand, but over what considerations were appropriate. Under the circumstances of this case, that was a matter going to the weight of Dreessen's opinion, not its admissibility.

Nor is it fatal to the Holmans' cause, as the district suggests, that neither Dreessen nor any other witness attempted to determine exactly how much additional water would be discharged upon and accumulate on the Holmans' land at any given time solely because of the closing of the floodgate. As the district acknowledges, when water from another source has been added to water from a source for which a defendant is liable and the combined water causes damage, it is incumbent upon the plaintiff to establish either that the entire damage would have occurred from the water for which the defendant is liable or to establish what amount of damage was caused by the water for which the defendant is liable. *Holman I, supra.*

Here, the Holmans' evidence is that but for the additional discharge and accumulation of water because of the easement, the Holmans' land could have been developed in a fashion that it now cannot. Thus, the evidence is that the entire diminution in the value of the land is occasioned by the easement; that is to say, the entire damage occurred because of the additional water discharged by the district. The trial court thus correctly refused to strike Dreessen's opinions.

(b) Rubin's and Yudelson's Opinions

Having resolved the first prong of the district's position concerning the value opinions rendered by Rubin and Yudelson, we reach the second prong in which the district complains of Dreessen's arguably inconsistent characterization of the effect of the easement on the developability of the Holmans' land.

We begin by noting that where, for other than bad faith

motives, the testimony of the same expert is conflicting, it rests with the trier of fact to resolve the conflict. See, *Brandt v. Leon Plastics, Inc.*, 240 Neb. 517, 483 N.W.2d 523 (1992); *McVaney v. Baird, Holm, McEachen*, 237 Neb. 451, 466 N.W.2d 499 (1991). No bad faith motives have been attributed to Dreessen.

Moreover, Rubin testified that he did not recall that Dreessen had said the developability of the property was "diminished" as opposed to "infeasible." Nor could he recall the exact words "seriously jeopardized" having been used. He understood Dreessen's opinion to be that because of the presence of additional water due to the closing of the floodgate, the taking rendered development of the residential lot plans infeasible such that the two development schemes possible before the taking could not be implemented.

Yudelson testified that Dreessen had told him that developability would be made infeasible rather than diminished. Neither did he remember the word "jeopardized" being used by Dreessen. In any event, Yudelson felt that the difference in description was a matter of semantics rather than substance.

Yudelson explained that for the purposes of making his appraisal, there was no difference between diminished and infeasible because he was testifying as to the effect the additional accumulation of water had on the value of the land developed in accordance with one or the other of the two schemes possible before the taking and the value of the land absent either of those schemes.

As the jury was entitled to resolve Dreessen's characterization of the effect of the easement and to assess its impact on the opinions expressed by Rubin and Yudelson, the trial court correctly refused to strike their testimony in this regard.

(c) Resolution

Accordingly, the first assignment of error is resolved against the district.

2. Refusal to Receive Evidence

In the second assignment of error, the district urges that the trial court mistakenly refused to receive into evidence an exhibit

containing Max Holman's pretaking representations to the board of equalization that the tax value of his property was but $160,145; that most of the area was sand, gravel, and water; and that only 16 acres consisted of land.

As we understand the argument, it is that the exhibit should have been received under Neb. Evid. R. 801(4)(b)(i), Neb. Rev. Stat. § 27-801(4)(b)(i) (Reissue 1989), which excludes from the definition of hearsay a statement offered against a party which is the party's own statement, referred to as the "admissions of a party-opponent" exception to the hearsay rule. See Neb. Evid. R. 613, Neb. Rev. Stat. § 27-613 (Reissue 1989).

This case presents a different situation than that presented in *Lienemann v. City of Omaha*, 191 Neb. 442, 215 N.W.2d 893 (1974), wherein we ruled that the condemner could not introduce the tax assessment into evidence. Here, the district wishes to introduce what Max Holman said about the tax value of his own property. Nonetheless, *Lienemann* rests on the principle that the value of land for tax purposes is generally not admissible as direct evidence of value for purposes other than taxation. *Lienemann* recognizes that while real estate generally is to be taxed on the basis of its actual value, Neb. Rev. Stat. § 77-201 (Cum. Supp. 1992), other factors, such as matters of uniformity and proportionality, Neb. Const. art. VIII, § 1, come into play which do not come into play otherwise. As a consequence, in any given case the tax value may be less than the market value. *Konicek v. Board of Equalization*, 212 Neb. 648, 324 N.W.2d 815 (1982). Thus, Max Holman's opinion as to what the tax value of his property was is not relevant as to its value for other purposes and was not admissible even as indirect evidence in the form of the admission of a party-opponent.

The situation might be different with respect to Max Holman's representations as to the physical attributes of the property. But we do not reach that issue, for the district made no separate offer of the exhibit with the reference to the tax value removed. If an exhibit is only admissible in part, it is incumbent on the offeror to select and offer only the admissible part; if one offers both the admissible and inadmissible parts, the trial court may reject the entire offer. See, *Ferlise v. Raznick*, 202 Neb. 745, 277 N.W.2d 94 (1979); 1 McCormick on

Evidence § 51 (John W. Strong 4th ed. 1992).

While the district specifically contends that it was "prevented from interrogating [Max Holman] concerning" his representations to the board, the district does not direct us to, and we do not find, any place in the record where it attempted such an interrogation. Just as we cannot know how the trial court would have ruled on an objection to an offer of only a portion of the excluded exhibit, neither can we know how the trial court would have ruled on an objection not made to a question not posed. See *Sherman County Bank v. Kallhoff*, 205 Neb. 392, 288 N.W.2d 24 (1980) (only when substance of excluded evidence apparent from context of question that offer of proof not necessary in order to predicate error).

Thus, the second assignment of error must also be resolved against the district.

3. Refusal to Direct Verdict

The short answer to the district's complaint in the third assignment of error, the trial court's refusal to direct a verdict in the district's favor at the close of the Holmans' case, is that by thereafter introducing evidence, the district waived any error in that ruling. *Palmtag v. Gartner Constr. Co.*, 245 Neb. 405, 513 N.W.2d 495 (1994) (defendant who moves for directed verdict at close of plaintiff's evidence, and upon overruling of motion proceeds with trial, waives any error on motion).

Beyond that, in order to sustain a motion for directed verdict, the trial court must resolve the controversy as a matter of law and is to do so only when the facts are such that reasonable minds can draw only one conclusion; in considering the evidence for the purposes of a directed verdict motion, the party against whom the motion is made is entitled to have the benefit of every inference which can reasonably be drawn from the evidence, and the case may not be decided as a matter of law if there is any evidence in favor of the party against whom the motion is made. *Lindsay Mfg. Co. v. Universal Surety Co.*, *ante* p. 495, 519 N.W.2d 530 (1994); *Baker v. St. Paul Fire & Marine Ins. Co.*, 240 Neb. 14, 480 N.W.2d 192 (1992). The resolution in subpart 1 of the district's first assignment of error demonstrates that the facts were not such that reasonable minds

could draw only one conclusion. Thus, it would have been error for the trial court to have sustained the district's motion.

Therefore, the district's third assignment of error is resolved against the district as well.

4. Interest Calculation

In the fourth and last assignment of error, the district claims the trial court improperly calculated the interest due on the judgment at 14 percent per annum.

To the extent relevant, Neb. Rev. Stat. § 76-711 (Supp. 1993) provides that in an appeal taken by the condemnee from the award of the appraisers, the condemnee shall be entitled to interest at the rate provided by Neb. Rev. Stat. § 45-104.02 (Reissue 1993) "as such rate may from time to time be adjusted." Section 45-104.02 provides that the interest rate "shall be redetermined every other year"

> by the Tax Commissioner and shall be equal to the average short-term borrowing rate for the federal government during July of the previous year rounded to the nearest whole percentage point plus three percentage points. If the new rate does not increase or decrease the old rate by at least two percentage points, the old rate shall continue in effect.

However, we find no evidence in the record which permits us to rule that the trial court erred in using 14 percent in computing the interest due.

Consequently, as with the previous assignments of error, the fourth assignment must be resolved against the district.

V. JUDGMENT

The record failing to sustain any of the district's assignments of error, the judgment of the trial court is, as first noted in part I, affirmed.

Affirmed.

EARTH SCIENCE LABORATORIES, INC., APPELLANT, V. ADKINS & WONDRA, P.C., AND JESSE T. ADKINS, APPELLEES.

523 N.W.2d 254

Filed November 4, 1994. No. S-93-461.

1. **Attorney and Client.** A lawyer's duty is to his client and does not extend to third parties absent facts establishing a duty to them.
2. **Malpractice: Attorney and Client: Public Policy.** A claim for legal malpractice cannot be assigned because of public policy considerations concerning the personal nature and confidentiality of the attorney-client relationship.
3. **Demurrer: Pleadings.** When a court sustains a demurrer, the losing party is entitled to amend the pleadings unless there is no reasonable possibility that amendment will remedy the deficiency.

Appeal from the District Court for Phelps County: JOHN J. BATTERSHELL, Judge. Affirmed.

Steven D. Davidson, of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, for appellant.

Donald R. Witt and David D. Zwart, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellees.

HASTINGS, C.J., WHITE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ., and BOSLAUGH, J., Retired.

BOSLAUGH, J., Retired.

The plaintiff, Earth Science Laboratories, Inc., appeals from an order of the trial court which sustained the defendants' demurrer without leave to amend. The defendants are Adkins & Wondra, P.C., and Jesse T. Adkins.

Jesse Adkins is the former attorney for Sorber Chemical, Inc., which filed a petition in bankruptcy in 1990 under chapter 11 of the U.S. Bankruptcy Code.

In March 1991, the trustee in bankruptcy obtained approval from the bankruptcy court to sell and assign all of Sorber Chemical's assets to the plaintiff. The corporate stock of Sorber Chemical was not part of the sale. The sale included "all of the right, title and interest, if any, of the Debtor, Sorber Chemical, Inc., in and to all claims, causes of action, and rights or choses in action."

The trustee in bankruptcy specifically identified claims and causes of action against Oaktree, Inc.; Kenneth Sorber; Sorber

International; Leading Edge; Genesis I; Sorber, Inc.; and Chemstar. A cause of action for legal malpractice against the defendants was not listed or mentioned in the sale and assignment documents; however, the sale and assignment contained a broad provision which included "[a]ll other claims, demands, and causes of action of any other nature, known or unknown, now existing or hereafter arising."

The plaintiff filed the present action against the defendants as the assignee of Sorber Chemical's rights in a claimed legal malpractice action. The plaintiff asserted several theories of recovery, including claims for professional negligence, breach of fiduciary duties, breach of contract, and breach of duties imposed by federal and state law, all arising out of the attorney-client relationship between the defendants and Sorber Chemical.

The defendants demurred to the plaintiff's first amended petition for failure to state facts sufficient to constitute a cause of action against the defendants and because there was a defect of parties in that the plaintiff was not the real party in interest.

The trial court sustained the defendants' demurrer and dismissed the action without leave to amend because the plaintiff would not be able to correct the defects in the first amended petition by additional pleading. The trial court reasoned:

> Public Policy in the State of Nebraska and the law in the State of Nebraska provide specifically that a cause of action for legal malpractice is a personal right and can only be maintained by the client. This rule of law is based upon the relationship between the attorney and his client, and the facts that the only obligation an attorney has in Nebraska is to his or her client, and not to any third party.
>
> The Public Policy considerations in determining that a claim [for] legal malpractice cannot be assigned, are based upon the attorney-client relationship being personal, and the necessity for [l]oyalty in the personal relationship.

The plaintiff has appealed and assigns as error the trial court's conclusions in sustaining the defendants' demurrer and the trial court's dismissal of the plaintiff's first amended petition without leave to amend.

Among other jurisdictions in which the issue of the assignability of legal malpractice claims has arisen, the majority have held that such claims are not assignable. See, *Scarlett v. Barnes*, 121 B.R. 578 (W.D. Mo. 1990); *Schroeder v. Hudgins*, 142 Ariz. 395, 690 P.2d 114 (Ariz. App. 1984); *Goodley v. Wank & Wank, Inc.*, 62 Cal. App. 3d 389, 133 Cal. Rptr. 83 (1976); *Roberts v. Holland & Hart*, 857 P.2d 492 (Colo. App. 1993); *Washington v. Fireman's Fund Ins. Co.*, 459 So. 2d 1148 (Fla. App. 1984); *Brocato v. Prairie State Farmers Ins. Ass'n*, 166 Ill. App. 3d 986, 520 N.E.2d 1200 (1988); *Picadilly, Inc. v. Raikos*, 582 N.E.2d 338 (Ind. 1991); *Bank IV Wichita v. Arn, Mullins, Unruh, Kuhn & Wilson*, 250 Kan. 490, 827 P.2d 758 (1992); *Coffey v. Jefferson County Bd. of Educ.*, 756 S.W.2d 155 (Ky. App. 1988); *Joos v Drillock*, 127 Mich. App. 99, 338 N.W.2d 736 (1983); *Wagener v. McDonald*, 509 N.W.2d 188 (Minn. App. 1993); *Chaffee v. Smith*, 98 Nev. 222, 645 P.2d 966 (1982). Most of the jurisdictions refusing to allow assignment of legal malpractice claims have done so based on public policy considerations concerning "the uniquely personal nature of legal services and the contract out of which a highly personal and confidential attorney-client relationship arises." *Goodley v. Wank & Wank, Inc.*, 62 Cal. App. 3d at 395, 133 Cal. Rptr. at 86.

The plaintiff in the present case argues that the public policy reasoning articulated by the jurisdictions refusing to allow assignment of legal malpractice claims is not applicable under the facts of this case because its purchase of Sorber Chemical's assets puts the plaintiff in the position of a successor corporation, giving it the ability to pursue the legal malpractice claim and determine the consequences flowing from that decision.

In *Bank IV Wichita v. Arn, Mullins, Unruh, Kuhn & Wilson, supra*, a similar argument was made. In that case, Bank IV Wichita was a major creditor of George C. Christopher & Son, Inc. (Christopher I). Christopher I was a client of Arn, Mullins, Unruh, Kuhn & Wilson (Arn, Mullins). Christopher II, a former wholly owned subsidiary of Bank IV, was formed to take possession of the assets of Christopher I and operate the business after Bank IV foreclosed on Christopher I. Bank IV

and Christopher II brought a legal malpractice action against Arn, Mullins that it claimed Christopher I could have brought. The Kansas Supreme Court held that the legal malpractice claim of Christopher I against Arn, Mullins was not assignable to Bank IV and Christopher II because public policy considerations preclude the assignment of legal malpractice claims, since such claims are personal to the client. The court stated: "Bank IV does not acquire the malpractice claim by assignment, foreclosure, subrogation, or successor status. Under the facts of the case at bar, no duty is owing from Arn, Mullins to Bank IV, a nonclient." 250 Kan. at 491, 827 P.2d at 760.

The court held that the same policy reasons which prevent assignment of legal malpractice claims also prevent transfer of such claims by succession. *Bank IV Wichita v. Arn, Mullins, Unruh, Kuhn & Wilson, supra.*

In order to recover in an action for legal malpractice, the plaintiff must allege and prove (1) a duty, (2) breach of that duty, (3) proximate cause, and (4) resulting damage. *Stansbery v. Schroeder*, 226 Neb. 492, 412 N.W.2d 447 (1987). In this jurisdiction, "[t]he rule is well established that a lawyer's duty is to his client and does not extend to third parties absent facts establishing a duty to them." *Landrigan v. Nelson*, 227 Neb. 835, 836, 420 N.W.2d 313, 314 (1988), citing *Lilyhorn v. Dier*, 214 Neb. 728, 335 N.W.2d 554 (1983), and *Ames Bank v. Hahn*, 205 Neb. 353, 287 N.W.2d 687 (1980).

In this case, the defendants owed no duty to the plaintiff, who was not a client, and the plaintiff did not acquire that duty through its purchase of the assets of Sorber Chemical because of the personal nature and confidentiality involved in the attorney-client relationship.

Although generally the law supports assignability of rights, it does not permit assignments for matters of personal trust or confidence, or for personal services. *Roberts v. Holland & Hart*, 857 P.2d 492 (Colo. App. 1993). See, also, *Schupack v. McDonald's System, Inc.*, 200 Neb. 485, 264 N.W.2d 827 (1978).

"In our view, the assignment of legal malpractice claims involve matters of personal trust and personal service and do

not lend themselves to assignability because permitting the transfer of such claims would undermine the important relationship between an attorney and client." *Roberts v. Holland & Hart*, 857 P.2d at 495.

We are persuaded by the reasoning in *Roberts* and other jurisdictions which refuse to permit the assignment of legal malpractice claims because of public policy considerations concerning the personal nature and confidentiality of the attorney-client relationship. Accordingly, the trial court did not err in sustaining the defendants' demurrer.

When a court sustains a demurrer, the losing party is entitled to amend the pleadings unless there is no reasonable possibility that amendment will remedy the deficiency. *Hoch v. Prokop*, 244 Neb. 443, 507 N.W.2d 626 (1993).

The plaintiff's sole basis for instituting this action is through its purchase and assignment of the assets of Sorber Chemical. Because a legal malpractice claim is not assignable, there is no reasonable possibility that the plaintiff can amend its petition to state a cause of action against the defendants, and the trial court did not err in denying the plaintiff the opportunity to amend its first amended petition.

The judgment of the trial court is affirmed.

AFFIRMED.

CAPORALE, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. JOSEPH B. REYNOLDS, APPELLANT.

523 N.W.2d 377

Filed November 4, 1994. No. S-93-666.

1. **Courts: Juvenile Courts: Jurisdiction: Appeal and Error.** An appeal from the denial of a transfer to juvenile court is reviewed for abuse of discretion.
2. **Courts: Juvenile Courts: Jurisdiction: Records.** When a juvenile requests that the juvenile's case be transferred to juvenile court, it is mandatory for a trial court to set forth on the record its findings supporting its determination that there is a sound basis for refusing to transfer the juvenile's case.

3. **Courts: Juvenile Courts: Jurisdiction.** The juvenile court has concurrent original jurisdiction with the district court as to any juvenile who has committed an act which would constitute a felony.
4. **Juvenile Courts: Words and Phrases.** A juvenile is any person under the age of 18.
5. **Courts: Juvenile Courts: Jurisdiction.** The general rule is that on request by a juvenile, the district court *must* transfer a juvenile case involving a felony from district court to juvenile court, unless a sound basis for retaining jurisdiction exists.
6. **Criminal Law: Courts: Juvenile Courts: Jurisdiction: Waiver.** In deciding whether to grant a requested waiver of the district court's jurisdiction and to transfer the proceedings to juvenile court, the district court having jurisdiction over a pending criminal prosecution is required to consider the juvenile's request in light of the criteria set forth in Neb. Rev. Stat. § 43-276 (Reissue 1993).

Petition for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, and CONNOLLY and HANNON, Judges, on appeal thereto from the District Court for Douglas County, STEPHEN A. DAVIS, Judge. Judgment of Court of Appeals reversed, and cause remanded with direction.

Thomas M. Kenney, Douglas County Public Defender, and Kelly S. Breen for appellant.

Don Stenberg, Attorney General, and Marilyn B. Hutchinson for appellee.

HASTINGS, C.J., WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ., and BOSLAUGH, J., Retired.

PER CURIAM.

Claiming the district court for Douglas County erred in refusing to transfer his case to juvenile court, Joseph B. Reynolds, who at the time of the incidents involved here was 16 years old, appealed his conviction for attempted theft by unlawful taking, a Class IV felony, to the Nebraska Court of Appeals.

At the transfer hearing in the district court, Reynolds did not direct the judge's attention to Neb. Rev. Stat. §§ 43-261 (Reissue 1993) and 29-1816 (Reissue 1989) which require a judge to make specific findings as to why a defendant's motion to transfer a case to the juvenile court is not granted. The Court of Appeals affirmed Reynolds' conviction and held that, by such omission on the part of Reynolds, he waived his right to

claim error because of the trial court's failure to make the findings required by §§ 43-261 and 29-1816. This court granted Reynolds' petition for further review.

We reverse the decision of the Court of Appeals and remand the cause to that court with direction to remand the cause to the district court with direction to make the findings required by §§ 43-261 and 29-1816 and to certify them to this court for further consideration of the appeal.

ASSIGNMENT OF ERROR

Restated, Reynolds claims that the Court of Appeals erred in finding that, because he did not bring to the trial court's attention the statutory requirement for the court to set forth specific findings in refusing to transfer the case to juvenile court, the defendant waived his right on appeal to argue the error of the trial court's failure to do so.

FACTS

The record reflects the following:

On November 19, 1992, Reynolds, then 16 years old, and another youth, then 15 years old, decided to "go jack a car." The 15-year-old smashed a window of a car in an Omaha parking lot. Reynolds, meanwhile, had moved to another car and broke its window and its steering column. The owner of the second car appeared and scuffled with Reynolds. Waving a screwdriver, Reynolds broke away and ran. However, he was apprehended by the owner of the car.

Reynolds explained to the police his motivation in wanting to take the car: "I just wanted to drive around. We were going to park the cars when we were done."

Reynolds was charged with two counts of attempted theft by unlawful taking. He asked the district court to transfer his case to the separate juvenile court of Douglas County. At a hearing held upon Reynolds' motion, the State offered a copy of the police reports regarding the alleged incidents. Reynolds submitted a transcript of his high school grades and the testimony of his foster mother, Lois Jackson. Reynolds had lived with Jackson and had attended school since his parole from the Youth Development Center-Kearney on burglary charges. Jackson testified that Reynolds faced a possible parole

violation in juvenile court as a result of the attempted theft by unlawful taking charges.

Jackson told the district court that Reynolds participated in extracurricular activities at school and abided by the rules of the foster home. The other youth involved in the attempted auto theft incidents also lived in Jackson's foster home. Jackson testified that the younger youth had a history of auto theft involvement. She also testified that Reynolds easily succumbed to peer pressure and had been greatly influenced by his 15-year-old companion.

The district court denied Reynolds' motion to transfer his case to juvenile court. The trial court did not set forth specific findings for its reasons for retaining jurisdiction of the case.

Following a subsequent bench trial, Reynolds was found guilty of one count of attempted theft by unlawful taking, a Class IV felony, carrying a penalty of up to 5 years' imprisonment, up to a $10,000 fine, or both. See Neb. Rev. Stat. §§ 28-511, 28-105, and 28-201 (Reissue 1989). The second count was dismissed by the State. Reynolds was sentenced to 2 years' probation, including incarceration for 180 days.

STANDARD OF REVIEW

An appeal from the denial of a transfer to juvenile court is reviewed for abuse of discretion. *State v. Ice*, 244 Neb. 875, 509 N.W.2d 407 (1994); *State v. Doyle*, 237 Neb. 60, 464 N.W.2d 779 (1991).

ANALYSIS

The Court of Appeals held that, because Reynolds did not bring to the trial court's attention the requirement to set forth specific findings in refusing to transfer the case to juvenile court, he had waived the right to have specific findings made. In making its decision, the appeals court relied upon *State v. Highly*, 195 Neb. 498, 238 N.W.2d 909 (1976). In that criminal case, the defendant appealed the district court's decision to overrule his motion to transfer his case to juvenile court. The defendant's age was not specified in our opinion, only the fact that he was under the age of 18. The defendant in *Highly* contended that the district court failed to comply with its statutory obligation to set forth findings on the record to

support its decision to retain jurisdiction.

This court refused to reverse the judgment based upon the trial court's failure to set forth findings because no record of the hearing upon the defendant's motion to transfer the case to juvenile court was filed in this court. We further held that the judgment would not be reversed because the defendant did not at any time, by motion for new trial or otherwise, direct the attention of the trial court to the requirement of the statute. Without the record of the proceedings upon the motion to transfer, it was not possible to determine if the findings had been announced from the bench.

The present case is distinguishable from *Highly* because a record exists of the hearing on Reynolds' motion to transfer the case to juvenile court upon which this court can determine whether specific findings were set forth on the record by the trial court. Thus, the holding in *Highly* is not applicable in this case.

Reynolds' case is controlled by our holding in *State v. Phinney*, 235 Neb. 486, 455 N.W.2d 795 (1990) (*Phinney I*). In that case, we held that when a juvenile requests that the juvenile's case be transferred to juvenile court it is mandatory for a trial court to set forth on the record its findings supporting its determination that there is a sound basis for refusing to transfer the juvenile's case.

The State essentially argues that *Phinney I* stands for the proposition that the district court is required to set forth specific findings only when a juvenile defendant is under 16 years of age. We disagree.

The juvenile court has concurrent original jurisdiction with the district court as to any juvenile who has committed an act which would constitute a felony. See Neb. Rev. Stat. § 43-247 (Reissue 1993). Neb. Rev. Stat. § 43-245 (Reissue 1993) defines a juvenile as any person under the age of 18.

Neb. Rev. Stat. § 43-276 (Reissue 1993) provides that in cases involving any juvenile who has committed a felony, when the juvenile is *under the age of 16*, the *county attorney* is required to consider certain enumerated factors in making the determination whether to file a criminal charge or a juvenile court petition. Thus, the county attorney was not required by

§ 43-276 to consider these criteria in making his determination with respect to Reynolds because Reynolds was 16 years old at the time he committed the acts in question. However, this age restriction does not apply to the requirement that the district court must set forth its reasons for not transferring a case to juvenile court.

The general rule is that on request by a juvenile, the district court *must* transfer a juvenile case involving a felony from district court to juvenile court, unless a sound basis for retaining jurisdiction exists. See §§ 43-261 and 29-1816. See, also, *State v. Doyle*, 237 Neb. 60, 464 N.W.2d 779 (1991); *State v. Phinney*, 236 Neb. 76, 459 N.W.2d 200 (1990) (*Phinney II*).

In deciding whether to grant a requested waiver of the district court's jurisdiction and to transfer the case to juvenile court, the district court having jurisdiction over a pending criminal prosecution is required to consider the juvenile's request in light of the criteria set forth in § 43-276. See § 29-1816. See, also, *Doyle, supra*; *Phinney II, supra*. This requirement of the district court is not statutorily limited to cases in which the juvenile is under the age of 16.

The record fails to reflect that the trial court considered the criteria set forth in § 43-276 in denying Reynolds' motion to transfer his case to juvenile court. Therefore, the record does not provide a sufficient basis for a meaningful review to determine whether the district court abused its discretion in refusing to grant Reynolds' motion for transfer.

As in *Phinney I*, because the record before this court does not provide an adequate basis for a meaningful review, we reverse the Court of Appeals' holding and remand the cause to that court with direction to remand the cause to the district court with direction to that court to review the record made on the motion to transfer to juvenile court and to set forth its findings in the matter as provided by §§ 43-261 and 29-1816. Such findings shall then be certified to this court for further consideration of the appeal.

REVERSED AND REMANDED WITH DIRECTION.

STATE OF NEBRASKA EX REL. WILLIAM A. WIELAND, RELATOR, V. ALLEN J. BEERMANN, SECRETARY OF STATE OF THE STATE OF NEBRASKA, RESPONDENT.

523 N.W.2d 518

Filed November 4, 1994. No. S-94-897.

1. **Statutes: Appeal and Error.** The general rules governing statutory construction and interpretation provide that in the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; the Nebraska Supreme Court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
2. **Time: Words and Phrases.** "Prior to" means before and cannot include the terminal date.
3. **Statutes: Time.** Neb. Rev. Stat. § 25-2221 (Reissue 1989) controls the method of computing the statutory filing deadline imposed by Neb. Rev. Stat. § 32-707.01 (Reissue 1993).
4. **Actions: Words and Phrases.** The term "action or proceeding" generally refers to business before a court or judicial officer, but the term is not restricted in application to those actions which occur within the walls of a courtroom.
5. **Statutes: Intent: Time.** A statutory rule for the computation of time is usually construed as a general provision relating to all acts required and permitted by law, unless an intention to the contrary affirmatively appears or a different construction seems imperative, and it may be applied in matters of practice as well as in the construction of statutes.
6. **Time: Words and Phrases.** Unless the context shows otherwise, the word "month" means calendar month. A calendar month is a period terminating with the day of the succeeding month, numerically corresponding to the day of its beginning, less one. If there be no corresponding day of the succeeding month, it terminates with the last day thereof.
7. **Mandamus: Words and Phrases.** Mandamus is a law action and is defined as an extraordinary remedy, not a writ of right, issued to compel the performance of a purely ministerial act or duty, imposed by law upon an inferior tribunal, corporation, board, or person, where (1) the relator has a clear right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act in question, and (3) there is no other plain and adequate remedy available in the ordinary course of the law.
8. **Mandamus.** The general rule is that an act or duty is ministerial if there is an absolute duty to perform in a specified manner upon the existence of certain facts.
9. _____. A seemingly discretionary decision to act may, in fact, be purely ministerial.
10. _____. Legal or factual determinations made at the outset of the inquiry do not make the decision to act discretionary. The requirement to act upon certain factual findings is still ministerial if there is a requirement to act at all.
11. **Mandamus: Public Officers and Employees.** Where the duty of a public official

is mandatory and not discretionary, mandamus is available where the responsible officer has refused to carry out his statutory obligation.

12. **Constitutional Law: Courts.** The Nebraska Supreme Court will not pass upon the constitutionality of legislation absent a need to do so in order to properly dispose of an action.

Original action. Peremptory writ of mandamus issued.

Denzel R. Busick, of Luebs, Leininger, Smith, Busick & Johnson, for relator.

Don Stenberg, Attorney General, and Dale A. Comer for respondent.

HASTINGS, C.J., WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ., and BOSLAUGH, J., Retired.

PER CURIAM.

Relator, William A. Wieland, in this original action seeks a writ of mandamus compelling respondent, Allen J. Beermann, the Secretary of State of the State of Nebraska, to remove proposed Legislative Resolutions 2CA, 29CA, 277CA, 15CA, and 293CA from the November 8, 1994, general election ballot. Wieland alleges in his first cause of action that Beermann accepted the explanatory statements which describe the proposed constitutional amendments after the statutory filing deadline, and thus must be compelled to remove the proposals from the ballot. We grant the petition and hereby order Beermann to withdraw the proposed constitutional amendments listed above.

The facts of this case are not in dispute. Wieland and Beermann stipulate that the explanatory statements were delivered to Beermann's office by the Executive Board of the Legislative Council of the Nebraska Legislature on July 8, 1994. Neb. Rev. Stat. § 32-707.01 (Reissue 1993) provides in relevant part:

> When any proposal is placed on the ballot for a vote of the electorate of the entire state, submitted by the Legislature a statement, in clear, concise language, explaining the effect of a vote for and a vote against the proposal shall be printed immediately preceding the ballot title. Such statement . . . shall be prepared by the Executive

> Board of the Legislative Council and submitted to the Secretary of State *not less than four months prior to the general election* for certification to the county clerks and election commissioners along with the ballot titles.

(Emphasis supplied.) Wieland and Beermann disagree on whether the July 8 submission of the explanatory statements meets the deadline imposed by the Legislature in § 32-707.01.

At the heart of this action are two issues: (1) whether the explanatory statements were filed before the statutory deadline and (2) if the statements were not filed on time, whether a writ of mandamus is the proper remedy to compel Beermann to withdraw the proposals from the November 8 election ballot. We shall discuss each issue in order.

To determine whether the explanatory statements were timely filed, we must first ascertain the statutory deadline. It is clear that § 32-707.01 sets the amount of time that must intervene between the filing day and the election. At issue is how to apply the requirement of § 32-707.01 that the explanatory statements be submitted to the Secretary of State "not less than four months prior to the general election."

We have consistently held that the general rules governing statutory construction and interpretation provide that in the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; this court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *In re Application of Jantzen*, 245 Neb. 81, 511 N.W.2d 504 (1994); *State on behalf of Matchett v. Dunkle*, 244 Neb. 639, 508 N.W.2d 580 (1993); *Malzahn v. Transit Authority*, 244 Neb. 425, 507 N.W.2d 289 (1993).

Section 32-707.01 establishes the time within which the filing must be made. The statutory language clearly requires that no less than 4 entire months must intervene between the date the explanatory statements are filed and election day. "Prior to" means before and cannot include the terminal date. The time period to be computed must necessarily conclude before the election day, which commences at 12:01 a.m. on November 8. Thus, the election day itself cannot be considered. The 4-month period must conclude no later than November 7.

We must now look to statutory and case law to determine how to compute that 4-month period. Both Wieland and Beermann submit that Neb. Rev. Stat. § 25-2221 (Reissue 1989), which is generally used in the computation of time, controls the method of computing the last possible filing date in this case. We agree.

Section 25-2221 and its predecessors have long been applied by this court not only to matters in litigation, but also to statutes. *Ruan Transport Corp. v. Peake, Inc.*, 163 Neb. 319, 79 N.W.2d 575 (1956); *State ex rel. Smith v. Nebraska Liquor Control Commission*, 152 Neb. 676, 42 N.W.2d 297 (1950); *Wilson & Co. v. Otoe County*, 140 Neb. 518, 300 N.W. 415 (1941); *McGinn v. State*, 46 Neb. 427, 65 N.W. 46 (1895). However, since our last decision holding that § 25-2221 applied to statutes, it has been amended.

Section 25-2221 now provides, in relevant part, that "the period of time within which an act is to be done *in any action or proceeding* shall be computed by excluding the day of the act . . . after which the designated period of time begins to run. The last day of the period so computed shall be included . . . ." (Emphasis supplied.) Additionally, since *Ruan Transport Corp., supra*, Neb. Rev. Stat. §§ 25-520.01 to 25-520.03 (Reissue 1989) have been enacted. Section 25-520.02 defines the term "action or proceeding" to mean "all actions and proceedings in any court and any action or proceeding before the governing bodies of municipal corporations, public corporations, and political subdivisions for the equalization of special assessments or assessing the cost of any public improvement." Although § 25-520.02 provides a definition of the term "action or proceeding," the use of that definition is limited in application by § 25-520.03. Section 25-520.03 states that § 25-520.02 applies to "parties authorized by law to give notice by publication." Section 25-520.02 has never been applied in any other circumstance.

The phrase "in any action or proceeding" does not preclude the use of § 25-2221 in this matter. Although the term "action or proceeding" generally refers to business before a court or judicial officer, the term is not restricted in application to those actions which occur within the walls of a courtroom.

> A statutory rule for the computation of time is usually construed as a general provision relating to all acts required and permitted by law, unless an intention to the contrary affirmatively appears or a different construction seems imperative, and it may be applied in matters of practice as well as in the construction of statutes . . . .

86 C.J.S. *Time* § 8 at 830 (1954).

Thus, § 25-2221 controls the computation of time in this case. We therefore must exclude the filing date in computing the filing deadline and include the last day of the period.

Unless the context shows otherwise, the word "month" means calendar month. Neb. Rev. Stat. § 49-801(13) (Reissue 1993). See, also, *State v. Oldfield*, 236 Neb. 433, 461 N.W.2d 554 (1990); *State v. Jones*, 208 Neb. 641, 305 N.W.2d 355 (1981). A calendar month is a period terminating with the day of the succeeding month numerically corresponding to the day of its beginning, less one. *Oldfield, supra*; *Jones, supra*. If there be no corresponding day of the succeeding month, it terminates with the last day thereof. *Ruan Transport Corp., supra*.

Under our statutorily mandated method for counting months, the last date for a filing which would be "not less than four months prior to" November 8 would be July 7.

It is undisputed that the explanatory statements were filed on July 8. Using § 49-801(13) and § 25-2221 to compute the time established by § 32-707.01, we determine that the filing deadline was not met. Section 25-2221 requires us to discount the filing day when calculating the 4-month period. For a filing of July 8, we begin computing the 4-month period on July 9. Applying our general definition of the term "calendar month," we determine that a 4-month period beginning July 9 ends on November 8. See *Ruan Transport Corp., supra* (applying the general definition of the term "calendar month" in order to calculate time under a previous version of § 25-2221). That is not prior to the election. We therefore hold that the explanatory statements submitted to Beermann on July 8 were 1 day late. The Legislature implemented the time deadline; it is not the office of this court to extend that deadline or to forgive the Legislature's failure to abide by its own statutorily mandated time limitation.

Beermann contends that *State ex rel. Morris v. Marsh*, 183 Neb. 521, 162 N.W.2d 262 (1968), is analogous to the case now before this court. In *Morris*, a mandamus action was filed to require the Secretary of State to accept and file an initiative petition seeking a constitutional amendment prohibiting the State of Nebraska from levying a state income tax. On July 3, 1968, petitions bearing the signatures of 57,521 electors were filed with the Secretary of State, and on July 5, additional petition forms were filed. The Secretary of State in *Morris* determined that the filing of additional petition forms on July 5 was untimely under Neb. Const. art. III, § 2, which required that the petition " 'shall be filed with the Secretary of State, who shall submit the measure . . . at the first general election held *not less than four months after such petition shall have been filed*.' " (Emphasis supplied.) 183 Neb. at 525, 162 N.W.2d at 266. The district court in *Morris* found the July 5 submission timely for the November 5 election of that year, and this court affirmed. We held in *Morris* that

> [t]here is little or no dispute that in terms of a full day and an exact date, November 5 is a date exactly 4 months after July 5. The [Secretary of State] attempts to read the language of the Constitution as requiring the election to be held *more* than 4 months after the filing of the petition, instead of "not *less* than 4 months [after the filing of the petition]." . . . The district court's computation was correct.
>
> We hold that a requirement that an initiated measure be submitted at the first general election held not less than 4 months after filing of the petition is satisfied by a filing on July 5 for a general election to be held November 5.

(Emphasis in *Morris*.) 183 Neb. at 526-27, 162 N.W.2d at 266-67.

Morris is distinguishable from the case now before us. First, the language of the time deadlines differs in each case. Section 32-707.01 requires the explanatory statements to be submitted to the Secretary of State "not less than four months *prior to* the general election," whereas article III, § 2, in *Morris* required the petition to "be filed with the Secretary of State, who shall submit the measure . . . at the first general election held *not less*

than 4 months after such petition shall have been filed." Moreover, the time requirement in *Morris* was set by the Nebraska Constitution; thus, general common-law computation of time applied. Here, the time requirement is statutory. Hence, § 25-2221 is controlling and *Morris* is inapplicable.

However, even if *Morris* were applicable, the filing of the explanatory statements would still be untimely. In *Morris*, we said, "November 5 is a date exactly 4 months after July 5." Using that reasoning, November 7 is not exactly 4 months after July 8.

Having found that the explanatory statements were submitted after the deadline that the Legislature imposed upon itself in § 32-707.01, we now turn to the issue of whether a writ of mandamus is the proper avenue by which to remedy the wrong. We have long held that mandamus is a law action and is defined as an extraordinary remedy, not a writ of right, issued to compel the performance of a purely ministerial act or duty, imposed by law upon an inferior tribunal, corporation, board, or person, where (1) the relator has a clear right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to perform the act in question, and (3) there is no other plain and adequate remedy available in the ordinary course of the law. *State ex rel. Creighton Univ. v. Hickman*, 245 Neb. 247, 512 N.W.2d 374 (1994). In order for this court to order Beermann by writ of mandamus to withdraw the proposed constitutional amendments, we must find that (1) the act of withdrawing the proposals by Beermann is a purely ministerial act or duty, (2) Wieland has a clear right to the relief he seeks, (3) Beermann has a clear duty to remove the proposed constitutional amendments from the ballot, and (4) there is no other plain and adequate remedy available.

The general rule is that an act or duty is ministerial if there is an absolute duty to perform in a specified manner upon the existence of certain facts. *State ex rel. FirsTier Bank v. Buckley*, 244 Neb. 36, 503 N.W.2d 838 (1993). See, also, *State ex rel. Freezer Servs., Inc. v. Mullen*, 235 Neb. 981, 458 N.W.2d 245 (1990). A seemingly discretionary decision to act may, in fact, be purely ministerial. See, e.g., *State ex rel. Creighton Univ. v.*

Smith, 217 Neb. 682, 353 N.W.2d 267 (1984) (holding that administrative decisions based on a mistaken view of the law are ultimately not discretionary and that by mandamus a court can correct the mistake and compel the proper application of the law, thereby converting an otherwise discretionary act into a purely ministerial duty); *State ex rel. Creighton Univ. v. Hickman, supra* (holding that previous case law and the Code of Professional Responsibility imposed a clear duty on the judge to disqualify a law firm even though a judge's application of particular facts to the law would seem discretionary); *State ex rel. Hilt Truck Line v. Peterson*, 215 Neb. 81, 337 N.W.2d 133 (1983) (director of the Department of Motor Vehicles ordered by writ of mandamus to issue Hilt Truck Line a license even though he first had to ensure that a certain set of facts existed before it was his clear duty to act). For example, in *State ex rel. Morris v. Marsh*, 183 Neb. 521, 162 N.W.2d 262 (1968), the Secretary of State made a determination that the number of valid signatures was insufficient based on the statute. The court affirmed the mandamus action and the Secretary of State was ordered to place the initiative petition on the ballot. Legal or factual determinations made at the outset of the inquiry do not make the decision to act discretionary. The requirement to act upon certain factual findings is still ministerial if there is a requirement to act at all.

We have previously held that the Secretary of State's duties and responsibilities when determining the sufficiency of the number of signatures collected on an initiative petition are ministerial in nature. *State ex rel. Labedz v. Beermann*, 229 Neb. 657, 428 N.W.2d 608 (1988). The Secretary of State does not rely on evidence heard before a tribunal to determine the validity of the petition signatures, but, rather, relies on his own records in reaching a determination of validity. *Id.* See, also, *State ex rel. Brant v. Beermann*, 217 Neb. 632, 350 N.W.2d 18 (1984). Likewise, we find that Beermann's determination under § 32-707.01 that explanatory statements may or may not be timely filed is ministerial in nature and not discretionary. Where the duty of a public official is mandatory and not discretionary, mandamus is available where the responsible officer has refused to carry out his statutory obligation. *State ex rel. Goetz*

v. Lundak, 199 Neb. 585, 260 N.W.2d 589 (1977). Beermann has the ministerial duty to act upon his findings: to wit, he must withhold proposals if they were not filed within the deadline set by the statute. There is no discretion in this determination, for if the explanatory statements were filed on time, then they can be certified for the election; if they were not filed on time, then they cannot be certified for the election.

Neb. Rev. Stat. § 32-1051 (Reissue 1993) provides that "[t]he Secretary of State shall decide disputed points of election law, which decisions shall have the force of law until changed by the courts." Neb. Rev. Stat. § 32-1052 (Reissue 1993) provides:

> In addition to any other duties prescribed by law, the Secretary of State shall have the following duties:
>
> (1) To supervise the conduct of primary and general elections in this state;
>
> (2) To enforce the provisions of Chapter 32; and
>
> (3) With the assistance and advice of the Attorney General, to make uniform interpretations of Chapter 32.

Beermann thus has the clear duty by statute to decide disputed points of election law and to supervise the conduct of general elections. In this case, the disputed point of election law is whether the explanatory statements were filed on time. Supervising the conduct of elections requires Beermann to ensure that any proposals are properly submitted to his office. We find that Beermann had a clear duty under §§ 32-707.01 and 32-1051 to determine whether the proposals met the time deadline; to withhold the proposals, since they did not meet the required time deadline under § 32-707.01; and to supervise the conduct of the general election to be held on November 8, which includes withdrawing the invalidly submitted proposals under § 32-1052.

Wieland has a clear right to the relief he seeks, since we found that Beermann had the statutory duty to perform the ministerial act of withdrawing the proposed constitutional amendments. Wieland also has no other remedy available to him in this action. In concluding that (1) Beermann's duty to remove the untimely submitted explanatory statements from the November 8 election ballot is ministerial in nature, (2) Wieland has a clear right to the relief sought, (3) Beermann has

a clear statutory duty to remove the proposals, and (4) no other adequate remedy exists, we therefore find that mandamus is the proper action by which to remedy the invalid submission of the explanatory statements in this case.

Wieland challenges the constitutionality of proposed Legislative Resolution 2CA in his second cause of action. This issue will not be addressed, since this court will not pass upon the constitutionality of legislation absent a need to do so in order to properly dispose of an action. See *State ex rel. Labedz, supra*.

Having found that the explanatory statements for proposed Legislative Resolutions 2CA, 29CA, 277CA, 15CA, and 293CA were submitted after the deadline imposed by § 32-707.01, and having found that a writ of mandamus is the proper remedy in this case, we hereby order Beermann to remove the proposals listed above from the November 8 general election.

PEREMPTORY WRIT OF MANDAMUS ISSUED.

WHITE, J., concurring in part, and in part dissenting.

I agree with the dissent of Justice Wright and its conclusion that the explanatory statements were timely delivered. However, I agree with the majority that Legislative Resolution 2CA should nevertheless not be submitted to the electorate at the November 8, 1994, general election for the reasons following:

Neb. Rev. Stat. § 32-707.01 (Reissue 1993) requires that the Legislature submit a statement explaining a vote for and a vote against the proposed amendment, and that the explanatory statement must be worded so as not to be intentionally argumentative or likely to create prejudice either for or against the proposal. L.R. 2CA proposes to amend Neb. Const. art I, § 13, which states that "[a]ll courts shall be open, and every person, for any injury done him in his lands, goods, person or reputation, shall have a remedy by due course of law, and justice administered without denial or delay."

L.R. 2CA adds new language to the very end of the above section, stating that "except that the Legislature may provide for the enforcement of mediation, binding arbitration agreements, and other forms of dispute resolution which are

entered into voluntarily and which are not revocable other than upon such grounds as exist at law or in equity for the revocation of any contract."

The explanatory statement for L.R. 2CA submitted by the Legislature states as follows:

> A vote FOR this proposal would add a provision authorizing the Legislature to provide for the enforcement of mediation, binding arbitration agreements, and other forms of dispute resolution voluntarily entered into, and which are not revocable other than upon such grounds as exist at law or in equity for the revocation of any contract.
>
> A vote AGAINST this proposal would not add the new language referred to above authorizing the Legislature to enforce other forms of dispute resolution, including binding arbitration agreements voluntarily entered into.

The explanatory statement recites the exact language of the amendment itself and does not explain the effect a vote for or against the amendment will have, as required by § 32-707.01. The explanatory statement insufficiently conveys the consequences of a vote for or against L.R. 2CA. It does not explain that if a voter casts a vote for an amendment allowing binding arbitration and the resolution passes, the voter effectively waives the right to a jury trial as guaranteed by Neb. Const. art. I, § 6, and the right to appeal as guaranteed by Neb. Const. art. I, § 24. The voter also waives the protection and use of Nebraska's rules of evidence and rules of civil procedure.

The failure of L.R. 2CA to adequately advise voters of the effect that a vote for the passage of the amendment will have on their constitutional rights necessarily results in an explanatory statement that does not fairly present the consequences of the vote, in violation of § 32-707.01.

The voting public is entitled to be told that a vote in favor of a proposed amendment to the state's Constitution allows the elimination of the protection afforded by the judicial branch of government in the resolution of civil disputes arising out of a contract where an arbitration provision is inserted. A waiver of constitutional rights should not be inferred from a silent record.

This court as a guardian of this state's Constitution should not permit the surrender of constitutional rights without

assuring itself that those rights are surrendered voluntarily, knowingly, and intelligently.

HASTINGS, C.J., and WRIGHT, J., join in this concurrence and dissent.

WRIGHT, J., dissenting.

The majority holds that the filing of explanatory statements on July 8, 1994, for an election to be held on November 8, 1994, was not timely. I respectfully dissent. In my opinion, the majority has adopted a strained construction of Neb. Rev. Stat. § 32-707.01 (Reissue 1993), a construction which prevents the inclusion of the legislative resolutions on the November 8 ballot.

It is undisputed that the word "month" means calendar month unless the context is shown to intend otherwise. See Neb. Rev. Stat. § 49-801(13) (Reissue 1993). Thus, the sole issue is whether July 8 is 4 calendar months prior to November 8. The term "calendar month" was defined in *State v. Oldfield*, 236 Neb. 433, 461 N.W.2d 554 (1990). A calendar month denotes a period terminating with the day of the succeeding month numerically corresponding to the day of its beginning, less one. If there is no corresponding day of the succeeding month, the calendar month terminates with the last day thereof. For example, the calendar month beginning January 1 denotes the period terminating with the day of February 1, less one, or January 31. Thus, a filing on January 1 is 1 calendar month prior to February 1.

The majority concludes that Neb. Rev. Stat. § 25-2221 (Reissue 1989) applies in determining the filing deadline. I disagree. Section 25-2221 does not apply in this situation. Time computation under § 25-2221 relates only to the "period of time within which an act is to be done in any *action or proceeding* . . . ." (Emphasis supplied.) The situation in the case at bar is not an action or proceeding as those terms are defined in Neb. Rev. Stat. § 25-520.02 (Reissue 1989), which states: "The term action or proceeding means all actions and proceedings *in any court* and any action or proceeding *before the governing bodies of municipal corporations, public corporations, and political subdivisions for the equalization of*

special assessments or assessing the cost of any public improvement." (Emphasis supplied.) The act of submitting explanatory statements, as required by § 32-707.01, is not an action or proceeding, but is a purely legislative act.

The majority finds that § 25-520.02 does not define an action or proceeding for purposes of § 25-2221, but that § 25-520.02 is limited by Neb. Rev. Stat. § 25-520.03 (Reissue 1989). The Legislature, in the very section relied on by the majority, states that the definition of the phrase "action or proceeding" is one of statewide concern. The majority does not consider Neb. Rev. Stat. § 25-522 (Reissue 1989), which states that it is the right of any plaintiff or petitioner, when necessary, to obtain service by publication. Read in the context of § 25-522, the second sentence of § 25-520.03 merely affirms that all parties who may sue and be sued shall be given the benefit of service by publication. It does not restrict the scope of § 25-520.02. The definition of the phrase "action or proceeding" contained in § 25-520.02 applies to § 25-2221.

I also believe that § 25-2221 does not apply because under § 32-707.01, the computation of time operates retroactively from election day, while under § 25-2221, the computation operates prospectively from the date of an act. In my opinion, the two methods of computing time are irreconcilable.

As § 25-2221 is applied to actions and proceedings, the day of the past act is excluded. Section 25-2221 computes a deadline for filing from the date of a previous act. For example, the time for filing a notice of appeal, which must be filed within 30 days of a final order, would not include the date of the final order as a part of the 30 days for filing. The counting to determine the end of the 30-day period begins with the day after the previous act.

In the case at bar, § 32-707.01 requires the Legislature to file the statements "not less than four months prior to the general election." The counting is based upon a date certain in the future. Section 32-707.01 does not mandate excluding the date the statements are filed when computing the 4-month period. A statement filed on July 8 is not filed less than 4 months prior to November 8. November 8 is the date in the future which determines the last date on which the statements can be filed.

November 8 is excluded because the filing must be prior to that date, but in my opinion, there is no rational basis for excluding July 8, the date the statements were filed.

A similar question was addressed by the Arkansas Supreme Court in *Pafford v. Hall, Secretary of State*, 217 Ark. 734, 233 S.W.2d 72 (1950). The Arkansas Constitution directed that the petition be filed " 'not less than four months' " before the election. *Id.* at 739, 233 S.W.2d at 74. The election was scheduled to be held on November 7, and it was argued that the filing of the petition on July 7 was 1 day too late. The court rejected that argument and stated:

> That result can be reached only by excluding both the first and the last day, and would involve saying that January 1 is less than a month before February 1. The law does not care about fractions of a day, however, and we have consistently held that only one of the two days need be excluded.

Id. I agree with the Arkansas court's reasoning. A filing on January 1 is not less than a month prior to February 1. A filing on July 8 is not less than 4 months prior to November 8.

In the case at bar, § 32-707.01 uses as its reference point a date certain in the future, the day of the election, November 8, 1994. The statute requires filing of explanatory statements 4 months prior to the day of the election. For purposes of this statute, the first month was July 8 to August 7, 1994; the second month was August 8 to September 7; the third month was September 8 to October 7; and the fourth month was October 8 to November 7. November 7 is the day before election day. Thus, July 8, 1994, was the last possible day on which the explanatory statements could have been filed. In my opinion, the explanatory statements were timely filed with the Secretary of State.

HASTINGS, C.J., and WHITE, J., join in this dissent.

NO FRILLS SUPERMARKET, INC., OF OMAHA, DOING BUSINESS AS NO FRILLS SUPERMARKET, APPELLEE, V. NEBRASKA LIQUOR CONTROL COMMISSION, APPELLANT.

523 N.W.2d 528

Filed November 10, 1994. No. S-93-179.

1. **Administrative Law: Liquor Licenses: Appeal and Error.** On appeal, decisions of the Nebraska Liquor Control Commission are reviewed by this court de novo on the record.
2. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.
3. **Statutes: Legislature: Intent.** A legislative act operates only prospectively and not retrospectively unless the legislative intent and purpose that it should operate retrospectively is clearly disclosed.
4. **Statutes: Time.** Statutes covering substantive matters in effect at the time of the transaction govern, not later enacted statutes.
5. **Statutes: Appeal and Error.** The general rules governing statutory construction and interpretation provide that in the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
6. **Statutes.** A statute is not to be read as if open to construction as a matter of course. Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning. In the absence of anything to indicate the contrary, words must be given their ordinary meaning. It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language. Neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute.
7. **Legislature: Statutes: Presumptions: Intent.** The Legislature is presumed to know language used in a statute, and if a subsequent act on the same or similar subject uses different terms in the same connection, the court must presume that a change in the law was intended.
8. _____: _____: _____: _____. It will be presumed that the Legislature, in adopting an amendment, intended to make some change in the existing law and that the courts will endeavor to give some effect thereto.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed with directions.

Don Stenberg, Attorney General, and Marie C. Pawol for appellant.

Robert M. Zuber, of Zuber & Ginsburg, for appellee.

HASTINGS, C.J., WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ., and BOSLAUGH, J., Retired.

WRIGHT, J.

In this appeal, the Nebraska Liquor Control Commission seeks reversal of a Lancaster County District Court order which reversed a commission order suspending the liquor license of No Frills Supermarket, Inc., of Omaha (No Frills) for 5 days.

SCOPE OF REVIEW

On appeal, decisions of the Nebraska Liquor Control Commission are reviewed by this court de novo on the record. *Gas 'N Shop v. Nebraska Liquor Control Comm.*, 241 Neb. 898, 492 N.W.2d 7 (1992).

Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below. *Anderson v. Nashua Corp., ante* p. 420, 519 N.W.2d 275 (1994); *Association of Commonwealth Claimants v. Moylan, ante* p. 88, 517 N.W.2d 94 (1994).

FACTS

No Frills filed a petition in error in the Lancaster County District Court on November 6, 1992, asserting that the commission erred in determining that No Frills had permitted the selling, dispensing, or giving away of alcoholic liquor to a minor, in violation of 237 Neb. Admin. Code, ch. 6, § 019.01A (1991). This regulation is codified at Neb. Rev. Stat. § 53-180 (Reissue 1993). No Frills alleged that the sale was made with the knowledge of and in cooperation with a duly authorized law enforcement officer and that proof of this fact is an absolute defense to the charge pursuant to Neb. Rev. Stat. § 53-180.07 (Cum. Supp. 1992), which provides in pertinent part:

> In any prosecution of or any proceeding against any licensee charged with having made a sale to a minor, proof of the following shall be an absolute defense to the charge:
>
> . . . .
>
> (2) The sale was made with the knowledge of and in cooperation with a duly authorized law enforcement officer.

No Frills asked that it be reimbursed for the $250 fine it elected to pay in lieu of a 5-day suspension of its liquor license and for the assessed costs of $180.40.

The district court found that No Frills' liquor license was suspended as the result of a "sting operation," and that it was undisputed that No Frills sold alcohol to a minor and that the sale was made with the knowledge of and in cooperation with a law enforcement officer, providing an absolute defense for No Frills under § 53-180.07. The court reversed the commission's order and directed that the matter be dismissed. Attached to and made a part of the district court's order was the order from a case captioned "State of Nebraska, Plaintiff, vs. Tracy Porter, Defendant," Cass County District Court, docket 38, page 282.

In the Porter case, which was a criminal prosecution for the sale of alcohol to a minor, the district court analyzed § 53-180.07. The State had argued that the term "sale," as used in the statute, should be restricted to apply to only the situation where the seller, rather than the buyer, is cooperating with the police. The court stated that the term "generally refers to a transaction rather than to specific parties . . . ." Neb. Rev. Stat. § 53-103(17) (Reissue 1993) defines a sale as "any transfer, exchange, or barter in any manner or by any means for a consideration . . . ." In Porter, the court concluded that "there is no basis to restrict the term 'sale' to apply only when the seller, rather than the buyer, is cooperating with the police" and that § 53-180.07 provided an absolute defense.

ASSIGNMENTS OF ERROR

On appeal, the commission assigns as error the district court's statutory interpretation of § 53-180.07 and its reversal of the suspension order.

ANALYSIS

No Frills was charged with permitting the selling, dispensing, or giving away of alcoholic liquor to or for a person less than 21 years of age, in violation of 237 Neb. Admin. Code, ch. 6, § 019.01A (1991), which regulation states:

> 019.01A Sale to Minor; Defense: No licensee or partners, principals, agents or employees of any licensee shall sell any alcoholic liquors to any person who is a

minor as defined in Section 53-103[(24)] of the Nebraska Liquor Control Act except that proof of the following shall constitute an absolute defense:

019.01A1 The purchaser falsely represented in writing and supported with other documentary proof such as a driver's license that he was of legal age to purchase alcoholic liquor; and

019.01A2 That the appearance of such purchaser was such that an ordinary and prudent person would believe that such appearance conformed to any documentary description of appearance presented by the purchaser; and

019.01A3 The sale was made in good faith and in reliance upon the written representation, other documentary evidence, the appearance of the purchaser, and in the belief the purchaser was of legal age to make such purchase; or

019.01A4 The sale was made with the knowledge of and in cooperation with a duly authorized law enforcement officer or agent of the Nebraska Liquor Control Commission. (53-180, 53-180.07)

At the commission hearing, Bellevue police officer Michael Laufenberg stated that on April 10, 1992, he was involved in an investigation in which purchases of alcohol were made by a cooperating individual who was 19 years old. The minor entered 10 establishments, including convenience stores, grocery stores, and gas stations, and he was able to purchase alcohol from at least 4 of them. He was fitted with a wireless transmitter, and the transactions were recorded. The minor was instructed that if he was asked for identification, he should state that he had none. If the store proceeded to sell alcohol to him, he was to purchase it. If the store refused to sell to him, he was to leave. The minor purchased a six-pack of beer from No Frills and turned it over to police. The clerk who sold the beer was issued a citation for sale of alcohol to a minor and was suspended without pay for the remainder of the week. The cooperating individual testified that he purchased the six-pack of beer at No Frills without being asked for identification.

The issue in this case is the interpretation of § 53-180.07(2): "The sale was made with the knowledge of and in cooperation

with a duly authorized law enforcement officer," which language is also contained in the commission's regulations. The district court adopted No Frills' assertion that the sale was made with the knowledge of and in cooperation with a law enforcement officer, in that the minor was cooperating with police officers in purchasing the alcohol. The commission argues that the statutory defense is available only when *the licensee or its employees* make a sale of alcohol to a minor with the knowledge of and in cooperation with law enforcement, rather than when, as in this case, the *minor* is cooperating with law enforcement. The commission suggests that the context of § 53-180.07 requires a distinction between a "sale" and a "purchase" in determining whether the statutory defense applies. No Frills responds by pointing out that § 53-180.07 has been amended since the time of the sale at issue in this case. Effective September 9, 1993, the statute reads:

> In any prosecution of or any proceeding against any licensee charged with having made a sale to a minor, proof of the following shall be an absolute defense to the charge:
>
> . . . .
>
> (2) The *seller was acting* with the knowledge of and in cooperation with a duly authorized law enforcement officer.

(Emphasis supplied.) § 53-180.07 (Reissue 1993).

We have held that a legislative act operates only prospectively and not retrospectively unless the legislative intent and purpose that it should operate retrospectively is clearly disclosed. *Young v. Dodge Cty. Bd. of Supervisors*, 242 Neb. 1, 493 N.W.2d 160 (1992). " 'Statutes covering substantive matters in effect at the time of the transaction govern, not later enacted statutes.' " *Id.* at 5-6, 493 N.W.2d at 163. The amendment at issue made a substantive change in the statute. Thus, the statute in effect at the time of the sale of alcohol is the statute which we must analyze to determine its meaning and application. At that time, the statute contained the phrase "sale was made."

We note that statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below. *Anderson v. Nashua*

Corp., ante p. 420, 519 N.W.2d 275 (1994); *Association of Commonwealth Claimants v. Moylan, ante* p. 88, 517 N.W.2d 94 (1994). The general rules governing statutory construction and interpretation provide that in the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. See, *Association of Commonwealth Claimants v. Moylan, supra*; *In re Application of Jantzen*, 245 Neb. 81, 511 N.W.2d 504 (1994).

> " 'A statute is not to be read as if open to construction as a matter of course. Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning. In the absence of anything to indicate the contrary, words must be given their ordinary meaning. It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language. Neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute.' "

Gillam v. Firestone Tire & Rubber Co., 241 Neb. 414, 418, 489 N.W.2d 289, 292 (1992).

The plain language of § 53-180.07 (Cum. Supp. 1992) states that a retailer has an absolute defense to a charge of selling alcohol to a minor if the "sale was made" with the knowledge of and in cooperation with police. That is the case here. The statute does not state that the "purchase" must be made with the cooperation of police.

We have stated, " 'The Legislature is presumed to know language used in a statute and if a subsequent act on the same or similar subject uses different terms in the same connection the court must presume that a change in the law was intended. . . .' " *Jeter v. Board of Education*, 231 Neb. 80, 83, 435 N.W.2d 170, 173 (1989). "The general rule seems to be that it will be presumed that the Legislature, in adopting an amendment, intended to make some change in the existing law and that the courts will endeavor to give some effect thereto." *Hurley v. Brotherhood of R. R. Trainmen*, 147 Neb. 781, 790, 25 N.W.2d 29, 34 (1946).

Although the 1993 statutory amendment does not apply to this case because the amendment took effect after the sale of alcohol, it provides evidence that the earlier statute afforded a defense for both the buyer and the seller. After the Legislature amended the statute, the statutory defense was limited to cooperating sellers. However, at the time of the sale of alcohol by No Frills, the defense applied whenever a sale was made with the cooperation of law enforcement. The district court correctly held that No Frills was entitled to assert the absolute defense found in § 53-180.07 (Cum. Supp. 1992). Accordingly, the judgment of the district court is affirmed. The commission is directed to refund the $250 fine and the $180.40 in costs paid by No Frills.

AFFIRMED WITH DIRECTIONS.

IN RE ESTATE OF JANET MCCLYMONT HANNAN, DECEASED. ELIZABETH H. HYMAN, PERSONAL REPRESENTATIVE OF THE ESTATE OF JANET MCCLYMONT HANNAN, DECEASED, APPELLANT, V. MARY ELIZABETH GLOVER, APPELLEE.

523 N.W.2d 672

Filed November 18, 1994. No. S-92-534.

1. **Decedents' Estates: Appeal and Error.** An appellate court reviews probate cases for error appearing on the record made in the county court.
2. **Judgments: Appeal and Error.** As to questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.
3. **Wills: Real Estate: States.** Nebraska adheres to the rule that the law of the state where real property is situated governs exclusively the right of parties to real property and the methods of its transfer, including devise by will.
4. **Wills: Parent and Child: Words and Phrases.** An adopted child is the child of an adopting parent, and adopted persons are included in class gift terminology.
5. **Decedents' Estates: Wills.** Generally, a term of art used in reference to a devise or other testamentary disposition or provision has a technical but clear meaning.
6. **Decedents' Estates: Wills: Intent.** When intention is expressed in clear language used in a testator's will, a court must give full force and effect to the testator's

intention so expressed. When language in a will is clear and unambiguous, construction of a will is unnecessary and impermissible.

Petition for further review from the Nebraska Court of Appeals, CONNOLLY, HANNON, and WRIGHT, Judges, on appeal thereto from the District Court for Phelps County, STEPHEN ILLINGWORTH, Judge, on appeal thereto from the County Court for Phelps County, HARRY C. HAVERLY, Judge. Judgment of Court of Appeals reversed, and cause remanded with direction.

Martin J. Troshynski and Larry R. Baumann, of Kelley, Scritsmier & Byrne, P.C., for appellant.

Patricia E. Dodson, of Dodson & Dodson Attorneys, for appellee.

HASTINGS, C.J., WHITE, CAPORALE, FAHRNBRUCH, and LANPHIER, JJ., and BOSLAUGH, J., Retired.

FAHRNBRUCH, J.

Mary Elizabeth Glover filed a petition for further review of a Nebraska Court of Appeals decision which reversed the judgments of a district and a county court awarding her a share in Nebraska real estate under her grandmother's Virginia will.

We reverse the Court of Appeals' decision and remand the cause with direction to affirm the judgment of the district court for Phelps County.

STANDARD OF REVIEW

An appellate court reviews probate cases for error appearing on the record made in the county court. *In re Estate of Holt, ante* p. 50, 516 N.W.2d 608 (1994); *In re Estate of Trew*, 244 Neb. 490, 507 N.W.2d 478 (1993).

However, as to questions of law, an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below. See *In re Estate of Holt, supra.*

FACTS

This case was submitted to the Phelps County Court for disposition on the file, the briefs, and stipulated facts. The facts of this case, as stipulated to by the parties, and as contained in the record, are as follows:

On January 7, 1977, James Hannan, one of five children of the decedent, Janet McClymont Hannan, adopted Glover, his wife's 35-year-old daughter from a previous marriage. On March 13, 1977, Janet Hannan executed her last will and testament in Alexandria, Virginia, her place of residence. In May 1977, James Hannan died of cancer, leaving no children except Glover. On April 2, 1982, Janet Hannan died.

On April 28, 1982, the decedent's will was admitted to probate in the circuit court for the City of Alexandria, Virginia. The will provided for the decedent's residual estate to be divided in equal shares among her surviving children and the "issue" of her deceased children per stirpes. Glover filed a petition asking the court to declare that she was the issue of James Hannan and was entitled to a prescribed share of the decedent's estate.

Ultimately, the Virginia Supreme Court held that the word "issue," absent any indication of the testator's intent to the contrary, was to be given its common-law meaning and that, under Virginia law, issue did not include adopted children. See *Hyman v. Glover*, 232 Va. 140, 348 S.E.2d 269 (1986).

In Nebraska, an ancillary probate proceeding was filed by the personal representative in the Phelps County Court, requesting permission to sell the decedent's real property located in Phelps County. The property has been sold by stipulation of the parties. Also by stipulation, Glover's share of the proceeds has been held in escrow pending determination of whether she was entitled, under Nebraska law, to a share of the Nebraska real estate and thus to a share in the proceeds from its sale.

The Phelps County Court found that Nebraska is not required to accept Virginia's definition of the word "issue"; found that under Nebraska law, an adopted child is entitled to the same rights and privileges to inherit property as a natural child; and ordered that Glover receive a 20-percent share of the proceeds of the property, minus the required taxes due and paid. The district court affirmed the order of the county court.

The Court of Appeals reversed the district court. *In re Estate of Hannan*, 2 Neb. App. 636, 513 N.W.2d 339 (1994). The Court of Appeals found that Nebraska law controls the devise of Nebraska real property, but that a cardinal principle of

Nebraska law is that the intent of the testator be followed. The Court of Appeals further found that, in making a will, a testator is more likely to subscribe to the domiciliary state's definition of a word than to the definition provided under the law of the situs of the real property. Finally, the Court of Appeals held that although Nebraska has a public policy of treating adopted children equally with natural children, the presumed intent of the testator to disinherit her adopted granddaughter overrides this policy. This court granted Glover's petition for further review.

ASSIGNMENTS OF ERROR

Glover contends that the Court of Appeals erred in four respects. Restated, these assignments of error combine to assert that the Court of Appeals erred in relying on the Virginia Supreme Court's definition of the word "issue" in determining Glover's inheritance rights to the proceeds of Nebraska real property.

ANALYSIS

In order to determine whether Glover is entitled to a share of the proceeds from the sale of the decedent's Nebraska real estate, we must determine whether Nebraska law or Virginia law governs the definition of the word "issue" in the decedent's will.

As the Court of Appeals correctly noted, Nebraska "adheres to the rule that the law of the state where real property is situated governs exclusively the right of parties to real property and the methods of its transfer, including devise by will." *In re Estate of Hannan*, 2 Neb. App. at 642-43, 513 N.W.2d at 344.

Although Nebraska does grant reciprocal recognition to the final orders of other states as to the validity or construction of a will pursuant to Neb. Rev. Stat. § 30-2432 (Reissue 1989), Virginia has no such reciprocal statutory provision. In fact, Virginia has indicated that its policy is to apply its own law to the devise of real property located in Virginia. See, e.g., *Rinker v. Trout*, 171 Va. 327, 198 S.E. 913 (1938) (holding that heir was prohibited from maintaining an accounting in District of Columbia for land located in Virginia); *French, Ex'r v. Short*, 207 Va. 548, 551, 151 S.E.2d 354, 356-57 (1966) (admitting a

Florida resident's holographic will to probate as the will of testator's Virginia real estate even though Florida did not recognize the will and holding that "[u]nder Virginia law, a decedent's . . . real estate passes according to the law of the state where it lies"). Cf. *Seaton v. Seaton*, 184 Va. 180, 34 S.E.2d 236 (1945) (holding that Florida law governed land in Florida and that a widow could not be divested of her homestead rights by operation of a trust document to a trustee in Virginia). Therefore, we determine that Nebraska law controls Janet Hannan's devise of her real property located in Phelps County, Nebraska.

Under the Nebraska Probate Code, issue of a person is defined as "all his lineal descendants of all generations, with the relationship of parent and child at each generation being determined by the definitions of child and parent contained in this code." Neb. Rev. Stat. § 30-2209(23) (Reissue 1989).

The definition of "child" includes "any individual entitled to take as a child under this code by intestate succession from the parent whose relationship is involved and excludes any person who is only a stepchild, a foster child, a grandchild or any more remote descendant." § 30-2209(3).

The definition of "parent" includes "any person entitled to take, or who would be entitled to take if the child died without a will, as a parent under this code, by intestate succession from the child whose relationship is in question and excludes any person who is only a stepparent, foster parent, or grandparent." § 30-2209(31).

Nebraska statutes further provide that an adopted child is the child of an adopting parent, Neb. Rev. Stat. § 30-2309(1) (Reissue 1989), and that adopted persons are included in class gift terminology. Neb. Rev. Stat. § 30-2349 (Reissue 1989).

> The cardinal rule concerning a decedent's will is the requirement that the intention of the testator or testatrix shall be given effect, unless the maker of the will attempts to accomplish a purpose or to make a disposition contrary to some rule of law or public policy. [Citations omitted.] To arrive at a testator's or testatrix's intention expressed in a will, a court must examine the decedent's will in its entirety, consider and liberally interpret every provision in

> a will, employ the generally accepted literal and grammatical meaning of words used in the will, and assume that the maker of the will understood words stated in the will.

In re Estate of Walker, 224 Neb. 812, 818, 402 N.W.2d 251, 256 (1987).

Generally, a term of art used in reference to a devise or other testamentary disposition or provision has a technical but clear meaning. *In re Estate of Tjaden*, 225 Neb. 19, 402 N.W.2d 288 (1987). When intention is expressed in clear language used in a testator's will, a court must give full force and effect to the testator's intention so expressed. *Id.* When language in a will is clear and unambiguous, construction of a will is unnecessary and impermissible. *In re Estate of Walker, supra.* It is clear that, under Nebraska law, Glover is included in the class gift to issue of the decedent's deceased children.

The Court of Appeals correctly stated that the word "issue" is a term of art. Therefore, because the meaning of the word "issue" is clear and unambiguous as defined by Nebraska statutes, it was unnecessary and impermissible for the Court of Appeals to construe Janet Hannan's will. Rather, it was the duty of that court to give full force and effect to Hannan's intention as expressed by that clear language.

Accordingly, because under Nebraska law Glover is the issue of her adoptive father, James Hannan, the deceased child of the decedent, we hold that Glover is entitled to take her father's proportionate share of the proceeds from the sale of the decedent's real property located in this state.

CONCLUSION

Having held that the definition of the word "issue" is determined by Nebraska law as to the devise of real property located in this state and that Glover is therefore entitled to take as issue of her deceased father pursuant to the terms of Janet Hannan's will, we reverse the decision of the Nebraska Court of Appeals and remand the cause to that court with direction to affirm the judgment of the district court for Phelps County.

REVERSED AND REMANDED WITH DIRECTION.

WRIGHT, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. PHILIP FAHLK, APPELLANT.

524 N.W.2d 39

Filed November 18, 1994. No. S-92-1180.

1. **Trial: Rules of Evidence: Appeal and Error.** A ruling pursuant to Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1989), for exclusion of relevant evidence will be upheld on appeal unless the ruling is an abuse of discretion.
2. **Judges: Words and Phrases: Appeal and Error.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.
3. **Trial: Rebuttal Evidence: Appeal and Error.** The abuse of discretion standard is applied to an appellate court's review of a trial court's ruling on the admissibility of rebuttal testimony.
4. **Verdicts: Appeal and Error.** On a claim of insufficiency of the evidence, an appellate court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. Only where evidence lacks sufficient probative force as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.
5. **Criminal Law: Trial: Testimony: Intent.** Defendants may testify regarding their intent, or lack of intent, to commit the offenses with which they have been charged.
6. **Rules of Evidence.** All relevant evidence is admissible. Evidence which is not relevant is not admissible.
7. **Evidence: Words and Phrases.** Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
8. **Evidence.** There are two components to relevant evidence: materiality and probative value.
9. **Evidence: Pleadings: Words and Phrases.** Materiality looks to the relation between the propositions for which the evidence is offered and the issues in the case. If the evidence is offered to help prove a proposition which is not a matter in issue, the evidence is immaterial. What is "in issue," that is, within the range of the litigated controversy, is determined mainly by the pleadings, read in the light of the rules of pleading and controlled by the substantive law.
10. **Evidence: Words and Phrases.** The second aspect of relevance is probative value, the tendency of evidence to establish the proposition that it is offered to prove.
11. **Theft.** Conduct denominated theft in Neb. Rev. Stat. §§ 28-509 through 28-518 (Reissue 1989) constitutes a single offense encompassing the previously separate offenses known as larceny, embezzlement, false pretenses, etc.
12. **Theft: Intent.** Neb. Rev. Stat. § 28-511(1) (Reissue 1989) proscribes or condemns only that conduct in which criminal intent is present, distinguishing theft from activity which is otherwise permissible as noncriminal conduct.

13. **Criminal Law: Ratification.** Condonation or ratification is, generally speaking, no defense to a crime.
14. **Theft.** Consent is a valid defense to a charge of theft by taking. That consent may be implied or general consent.
15. **Trial: Witnesses.** The right to offer the testimony of witnesses is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies.
16. **Trial: Prosecuting Attorneys: Judges.** Comment regarding the assertion of marital privilege is prosecutorial misconduct. The claim of a privilege is not a permissible subject of comment by judge or counsel.
17. **Trial: Motions for Mistrial: Waiver: Appeal and Error.** When a party has knowledge during trial of irregularity or misconduct, he must timely assert his right to a mistrial. One may not waive an error, gamble on a favorable result, and, upon obtaining an unfavorable result, assert the previously waived error.
18. **Trial: Rebuttal Evidence.** Rebuttal evidence is confined to that which explains, disproves, or counteracts evidence introduced by the adverse party.
19. **Appeal and Error.** An objection, based on a specific ground and properly overruled, does not preserve a question for appellate review on any other ground.
20. **Trial: Rebuttal Evidence.** A trial court may in its discretion permit the introduction of evidence in rebuttal that is not strictly rebuttal evidence only for good reason and in the furtherance of justice.
21. **Criminal Law: Trial: Evidence: Appeal and Error.** Erroneous admission of evidence is harmless error and does not require reversal if the evidence is cumulative and other relevant evidence, properly admitted, supports the finding by the trier of fact. Erroneous admission of evidence in a criminal trial is not prejudicial if it can be said that the error was harmless beyond a reasonable doubt.
22. **Criminal Law: Statutes.** A penal statute is given a strict construction which is sensible and prevents injustice or an absurd consequence.
23. **Criminal Law.** Failure to volunteer information is not a physical act that violates Neb. Rev. Stat. § 28-901 (Reissue 1989). Nor are mere words, even those words deliberately intended to frustrate law enforcement, physical acts under § 28-901.
24. **Criminal Law: Public Officers and Employees.** The kind of official misconduct contemplated by Neb. Rev. Stat. § 28-901 (Reissue 1989) is a particularly dangerous and reprehensible kind of official misconduct, the purposeful obstruction of governmental function by breach of official duty.
25. **Criminal Law: Torts: Administrative Law.** An unlawful act in violation of Neb. Rev. Stat. § 28-901 (Reissue 1989) is any affirmative violation of legal duty, whether imposed by criminal statute, tort law, or administrative regulation.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, and HANNON and MILLER-LERMAN, Judges, on appeal thereto from the District Court for Otoe County, GEORGE A. THOMPSON, Judge. Judgment of Court of Appeals on count I reversed, and cause

remanded for a new trial. Judgment of Court of Appeals on count II reversed, and cause remanded with directions to dismiss.

David A. Domina and Denise E. Frost, of Domina & Copple, P.C., for appellant.

Don Stenberg, Attorney General, J. Kirk Brown, and, on brief, Donald A. Kohtz for appellee.

HASTINGS, C.J., WHITE, CAPORALE, FAHRNBRUCH, and LANPHIER, JJ., and BOSLAUGH, J., Retired.

LANPHIER, J.

Following a jury trial in Otoe County District Court, Philip Fahlk was convicted of theft by unlawful taking and of obstruction of government operations. The jury found that Fahlk, a superintendent for the Nebraska City Public School District, committed theft by unlawful taking when he took a computer from the school where he worked, in violation of Neb. Rev. Stat. § 28-511(1) (Reissue 1989). The jury further found that Fahlk obstructed government operations, in violation of Neb. Rev. Stat. § 28-901(1) (Reissue 1989), by giving a purported equipment checkout sheet to investigators inquiring about the missing computer. Fahlk was sentenced to 1 year of probation followed by 30 days in the Otoe County jail. Fahlk, thereafter, appealed to the Nebraska Court of Appeals.

Fahlk's assignments of error to the Court of Appeals alleged that the trial court erred in (1) preventing him from offering direct testimony that he did not intend to commit the crime of theft; (2) excluding evidence that the school board generally consented to the taking; (3) allowing the State to comment in closing argument that Fahlk's wife did not testify, therefore commenting on his assertion of the marital privilege; (4) improperly admitting rebuttal testimony that calls were made from Fahlk's home telephone to a witness; and (5) concluding that the weight of the evidence supported his convictions. See *State v. Fahlk*, 2 Neb. App. 421, 510 N.W.2d 97 (1993).

The Court of Appeals affirmed the judgment of the district court. See *Fahlk, supra*. Fahlk petitioned this court for further review. We granted the petition. Upon review of the assigned

errors, we hold that evidence regarding consent of the school board to the taking was relevant and should have been admissible. We further hold that the admission of the rebuttal testimony was improper. Accordingly, we reverse Fahlk's conviction of theft by unlawful taking. We reverse Fahlk's conviction of obstruction of government operations because the State failed to prove the requisite elements of that crime.

BACKGROUND

Fahlk was employed as the superintendent of the Nebraska City Public School District beginning July 1, 1991. Fahlk's initial duties included negotiating teacher contracts and preparing the Nebraska City Public Schools' budget. Fahlk testified that the school district had not equipped the superintendent's office with a computer, so he borrowed an Apple IIc computer from an elementary school and brought his family's computer printer to work in order to accomplish his duties.

On August 22, 1991, several computer printers were delivered to the superintendent's building for use in the senior high school. Jodi Rathe, an administrative assistant and bookkeeper for the school district, testified that she signed an invoice acknowledging the delivery of the three printers. The printers were placed in a locked kitchen area for overnight storage.

Another employee of the Nebraska City school system, William Lambrecht, testified that three printers were in the kitchen when he arrived at work on August 23, 1991, at approximately 7 a.m. Lambrecht returned to the kitchen area at approximately 7:20 a.m. At that time, Fahlk was present in the kitchen and only two printers remained.

Shortly thereafter, Rathe entered and noticed that one of the printer boxes was missing. Rathe conducted a thorough search for the printers with Lambrecht's help. They soon determined that none of the employees in the building had any knowledge of the printer.

Fahlk had left the building to attend a breakfast meeting; therefore, Rathe left a note on Fahlk's desk explaining the situation. As soon as Fahlk returned to the school, Rathe

provided him with the serial number of the missing machine and suggested that he call the police. Rathe gave Fahlk the invoice to refer to during his police report and then briefly left Fahlk's office. Upon her return, Fahlk said he had notified the police and handed the invoice to Rathe. Beside the serial number of the missing printer on the invoice was the notation "reported."

Shortly thereafter, Fahlk left the office in order to deliver the school budget in Lincoln. Fahlk also planned to help his daughter, Nicole Fahlk, move into her dormitory room at the University of Nebraska at Lincoln.

Fahlk wanted his daughter to have the use of the family's printer while at college. Fahlk testified that he had disconnected the family's printer from the computer system he had been using at work after working late at the office on August 22 and had placed it in his car. Fahlk claimed that he brought his family's computer printer to Lincoln and set it up in his daughter's dorm room on August 23.

Fahlk testified that he took a printer from the "gymnasium area" on the morning of August 23 in order to replace his family's printer. The gymnasium area is the same area of the school that the other witnesses referred to as the kitchen. Fahlk unpacked the printer and placed it under his desk. Fahlk claimed that no one had ever told him that the missing printer was a printer missing from the kitchen area.

On direct examination, Nicole Fahlk testified at first that her father did not bring a computer printer to her dorm on August 23. During cross-examination, however, Nicole stated that her father had delivered the family's printer to her dorm room on the day she moved in.

According to Fahlk, his family's printer proved to be better suited to the programs he used in his work than was the school district's printer. Fahlk testified that on September 18, 1991, (almost a month after the school district's printer was reported missing), he went to Lincoln and installed the school district's printer in his daughter's room. He then took his family's printer from his daughter's room in Lincoln and brought it back to his office.

On April 1, 1992, the formal investigation into the missing

printer was initiated. On that date, an investigator with the UN-Lincoln police department went to Nicole Fahlk's dorm room and informed her that she might be in possession of stolen computer equipment. The investigator examined Nicole's printer and determined that it did not have a serial number. After the investigator left, Nicole called her father and told him that the police had examined the computer.

On April 2, 1992, Nebraska State Patrol Investigator Terry Becker went to Fahlk's office to question him about the missing printer. Fahlk denied any knowledge of the printers that had been delivered to the school on August 22, 1991, and denied reporting a missing printer to the police. Becker asked Fahlk if a printer belonging to the Nebraska City school system was in the possession of his daughter. Fahlk indicated that his daughter had a printer which belonged to the school district. Fahlk told Becker that he had exchanged the school district's printer for his family's printer, which his daughter was using, because he wanted to use his family's printer with the computer system in his office at the Nebraska City school.

Fahlk testified that he never asked for the specific permission of the school board before he took the printer. However, after Becker's visit, Fahlk notified several members of the board of education by memorandum of the situation and asked for the board president's formal authorization. Fahlk stated in his memo that no secret had been made of the printer exchange and pointed out that his use of his personal equipment in support of the superintendent's office was not new. Fahlk indicated that the purpose of the memo was not to seek a board motion and vote; rather, Fahlk wanted the president's "informed signature." The matter was never presented to the entire board for a vote.

Becker returned to Fahlk's office on April 10, 1992, for further questioning. During this second visit, Fahlk acknowledged that he had taken one of the printers from the school's kitchen on August 23, and produced a signed checkout sheet. The checkout sheet contained a description of the equipment and its serial number and was dated September 18, 1991. Fahlk also showed Becker his calendar reflecting a "squeezed-in" entry on September 18, 1991, noting a printer

exchange with his daughter. Finally, Fahlk gave Becker a copy of his memorandum to the school board detailing the printer exchange and the reason for the exchange.

Fahlk testified that he did not produce the checkout sheet during his first meeting with Becker because Becker did not ask for it. However, the checkout sheet Fahlk produced was not the same form that was approved for use by the school district in September 1991. The approved form required the signatures of the school administrator and the media specialist. The checkout form that Fahlk produced required only his signature.

Fahlk was charged with theft by unlawful taking, in violation of § 28-511(1), and with obstructing government operations, in violation of § 28-901(1). Fahlk was found guilty of both counts. After the Court of Appeals affirmed his convictions, Fahlk petitioned this court for further review. We granted further review.

ASSIGNMENTS OF ERROR

Fahlk asserts that the Court of Appeals erred in (1) deciding that evidence which might indicate Fahlk did not intend to commit the crime of theft by unlawful taking was not relevant, (2) holding that reference during the State's closing argument to the failure of Fahlk's wife to testify did not prejudicially affect a substantial right of Fahlk's and also that Fahlk failed to preserve the error for appellate review, (3) holding that Fahlk's objection to the State's rebuttal evidence that someone had telephoned a witness from Fahlk's home was not specific enough to preserve the error for appellate review, and (4) affirming Fahlk's conviction for obstruction of government operations by reviewing the evidence in light of a different criminal statute than that under which he was charged.

STANDARD OF REVIEW

With regard to those issues concerning the exclusion of evidence, we note that " '[a] ruling pursuant to Neb. Evid. R. 403 for exclusion of relevant evidence will be upheld on appeal unless the ruling is an abuse of discretion.' " *State v. Dixon*, 240 Neb. 454, 456, 482 N.W.2d 573, 575 (1992); *State v. Lonnecker*, 237 Neb. 207, 465 N.W.2d 737 (1991).

[A] judicial abuse of discretion exists when a judge, within

> the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.

State v. Juhl, 234 Neb. 33, 43, 449 N.W.2d 202, 209 (1989).

The abuse of discretion standard is also applied to our review of the trial court's ruling on the admissibility of the rebuttal testimony. See, *State v. Pratt*, 197 Neb. 382, 249 N.W.2d 495 (1977); *State v. Keith*, 189 Neb. 536, 203 N.W.2d 500 (1973).

On a claim of insufficiency of the evidence, an appellate court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. Only where evidence lacks sufficient probative force as a matter of law may an appellate court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt. *State v. Cook*, 244 Neb. 751, 509 N.W.2d 200 (1993); *State v. Williams*, 239 Neb. 985, 480 N.W.2d 390 (1992).

All other issues addressed concern questions of law. When deciding questions of law, this court is obligated to reach conclusions independent of those reached by the trial court. *State v. White*, 244 Neb. 577, 508 N.W.2d 554 (1993); *Petska v. Olson Gravel, Inc.*, 243 Neb. 568, 500 N.W.2d 828 (1993).

EXCLUSION OF EVIDENCE

Fahlk asserts that the Court of Appeals erred in deciding that evidence which might indicate Fahlk did not intend to commit the crime of theft by unlawful taking was not relevant. The trial court precluded Fahlk from offering his own direct testimony regarding his state of mind during the alleged theft. See *State v. Fahlk*, 2 Neb. App. 421, 510 N.W.2d 97 (1993). Additionally, Fahlk was precluded from offering evidence regarding the school board's consent to the printer exchange.

DIRECT TESTIMONY OF LACK OF INTENT

First, Fahlk objects to the trial court's rulings with regard to his direct testimony. Fahlk sought to testify as follows:

> [Fahlk's counsel:] Mr. Fahlk, when you took the school district's ImageWriter II printer to Lincoln and brought your own ImageWriter back here, was it your intention to

keep the school district's property?

[Fahlk:] No.

[Prosecutor:] Objected to as invading the province of the Jury, and move to strike.

THE COURT: Sustained.

[Shortly thereafter, this exchange took place:]

[Fahlk's counsel:] Did you steal anything from the Nebraska City School District?

[Fahlk:] No.

[Prosecutor:] Objected to as invading the province of the Jury, and move to strike.

[THE COURT:] Sustained.

Fahlk sought to testify regarding the ultimate issue in this case: his guilt or innocence. "Such testimony, if believed, is clearly material to [the defendant's] defense, for it goes to the heart of the offense—whether [the defendant] intentionally violated the relevant statutes." *State v. Stott*, 243 Neb. 967, 978, 503 N.W.2d 822, 831 (1993). Defendants may testify regarding their intent, or lack of intent, to commit the offenses with which they have been charged. See *State v. Nielsen*, 243 Neb. 202, 498 N.W.2d 527 (1993).

Although the trial court erred in refusing to allow Fahlk to testify regarding his lack of intent, error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of a party is affected. Neb. Evid. R. 103, Neb. Rev. Stat. § 27-103 (Reissue 1989); *State v. Messersmith*, 238 Neb. 924, 473 N.W.2d 83 (1991). No substantial right of Fahlk's was affected by the trial court's refusal to admit Fahlk's opinions regarding his own guilt or innocence, because, as the Court of Appeals correctly noted, the substance of Fahlk's disputed testimony was placed before the jury.

The trial court allowed Fahlk to testify that "it was my intention that after negotiations for the 91-92 contract were completed, to take them [the printers] back, to reexchange them." Further, Fahlk was able to put his letter to the board of education into evidence. This letter explained Fahlk's reasons for the exchange and stated that the exchange was not intended to be permanent.

Therefore, Fahlk was able to put evidence before the jury

regarding his lack of intent. No substantial right of Fahlk was affected by the trial court's refusal to admit Fahlk's opinions regarding his own guilt or innocence; thus, no error may be predicated on the trial court's ruling that Fahlk was not entitled to testify about his state of mind during the alleged theft.

EVIDENCE OF SCHOOL BOARD'S CONSENT

Fahlk also sought to offer evidence regarding the school board's consent to the printer exchange. In response to the State's pretrial motion in limine, the trial court prohibited Fahlk from eliciting testimony or presenting evidence to show that the board of education had either condoned or ratified any alleged criminal behavior on the part of Fahlk.

At trial, Fahlk offered the testimony of Ann Nienkamp, president of the Nebraska City Board of Education, regarding board authorization of Fahlk's use of school property. In an offer of proof, Fahlk's attorney stated that if Nienkamp were allowed to testify, she would testify that

> she and the board of education did in fact charge the defendant with the responsibility for completing budget work, teacher negotiations work, bond issue work, computer acquisition work, and school asbestos removal work in whatever means that he could accomplish those tasks with all due dispatch and that he was authorized and permitted to use his own equipment to accomplish those tasks and that the board of education neither voiced nor indicated an objection and indeed shared and communicated to the defendant a willingness to permit him to do so on terms that would allow the use of his equipment by the school district and equipment owned by the school district of lesser value and lesser utility by him or members of his family at that same time that the school district was using his computer.

Following the offer of proof, the trial court questioned Nienkamp outside the presence of the jury. The court probed the witness to determine if the board had given explicit prior consent to Fahlk to exchange his family's printer for the school printer. After the witness responded negatively, the trial court restated its prior ruling that any evidence of subsequent

condonation of an unlawful act is not relevant or admissible. Counsel for Fahlk attempted to explain that his "intention in reciting that narrative offer was not to suggest that I would elicit from this witness testimony about ratification of the defendant's conduct after the fact."

Fahlk asserts that the Court of Appeals erred in affirming the trial court's exclusion of evidence regarding consent of the school board to the computer printer exchange. The Court of Appeals held that such evidence was not relevant because "the existence of the board's permission, or the lack thereof, is not a fact of consequence in this case and is therefore not material evidence." *State v. Fahlk*, 2 Neb. App. 421, 430, 510 N.W.2d 97, 103 (1993).

In order to decide this issue, this court must first determine whether the testimony as to the existence of the board's consent to Fahlk's exchange of the school's printer for his family's printer would have been relevant to the issues in the case and therefore admissible. "All relevant evidence is admissible . . . . Evidence which is not relevant is not admissible." Neb. Evid. R. 402, Neb. Rev. Stat. § 27-402 (Reissue 1989).

> Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 1989).
>
> There are two components to relevant evidence: " '[M]ateriality and probative value. Materiality looks to the relation between the propositions for which the evidence is offered and the issues in the case. If the evidence is offered to help prove a proposition which is not a matter in issue, the evidence is immaterial. What is "in issue," that is, within the range of the litigated controversy, is determined mainly by the pleadings, read in the light of the rules of pleading and controlled by the substantive law. . . .
>
> " 'The second aspect of relevance is probative value, the tendency of evidence to establish the proposition that it is offered to prove. . . .' "

State v. Bell, 242 Neb. 138, 141, 493 N.W.2d 339, 342-43 (1992).

Is evidence regarding an owner's consent relevant to the issues in this case? Fahlk was charged with violating § 28-511(1). Section 28-511 states that "[a] person is guilty of theft if he or she takes, or exercises control over, movable property of another with the intent to deprive him or her thereof." Conduct denominated theft in Neb. Rev. Stat. §§ 28-509 through 28-518 (Reissue 1989) constitutes a single offense encompassing the previously separate offenses known as larceny, embezzlement, false pretenses, etc. *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987).

"Section 28-511(1) proscribes or condemns only that conduct in which criminal intent is present, distinguishing theft from activity which is otherwise permissible as noncriminal conduct." *Copple*, 224 Neb. at 682, 401 N.W.2d at 150. The statutory prohibitions of § 28-511(1) must be read with other pertinent parts of the Nebraska Criminal Code. *Copple, supra.* The definitional statute pertaining to the crime of theft states that "[p]roperty of another shall mean property in which any person other than the actor has an interest which the actor is not privileged to infringe." Neb. Rev. Stat. § 28-509(6) (Reissue 1989).

If Fahlk was privileged to exchange his family's printer for the school's printer by virtue of the school board's consent, then Fahlk would have a complete defense to the crime of theft. Although the general rule is that consent of the victim is not a defense to a crime,

> [a] crime may be so defined that the absence of the victim's consent is an element thereof. Since, in such case, the presence of the victim's consent would negate an element of the crime, consent would be a defense. Thus, consent destroys the criminal character of an act of . . . taking the property of another which would otherwise constitute larceny.

1 Charles E. Torcia, Wharton's Criminal Law § 46 at 302-04 (15th ed. 1993). See, also, 21 Am. Jur. 2d *Criminal Law* § 189 (1981).

Prior consent or privilege to use the property of another must be distinguished from subsequent condonation by the owner. "Condonation or ratification is, generally speaking, no defense

to a crime." *State v. Higgin*, 257 Minn. 46, 50, 99 N.W.2d 902, 906 (1959). "[A] crime is by definition a public wrong against the State, it is not usually an acceptable defense that the person wronged by a criminal has condoned the offense." *Pratt v. State*, 167 Ga. App. 819, 820, 307 S.E.2d 714, 716 (1983).

In the case before us, the trial court properly excluded evidence regarding condonation or ratification. However, the court may also have excluded evidence regarding prior implied or general consent—"throwing out the baby with the bath water," so to speak.

In rejecting Fahlk's assignment of error regarding the relevancy of Nienkamp's testimony, the Court of Appeals erred in holding that the existence of an owner's (i.e., the school board's) permission, or lack thereof, is not a fact of consequence in this case involving a charge of theft by unlawful taking. *State v. Fahlk*, 2 Neb. App. 421, 510 N.W.2d 97 (1993). Consent is a valid defense to a charge of theft by taking. That consent may be implied or general consent.

Fahlk was deprived of the opportunity to present testimony regarding the board's alleged prior implied or general consent to his taking of school property. Few rights are more fundamental than that of an accused to present witnesses in his own defense. *State v. McSwine*, 231 Neb. 886, 438 N.W.2d 778 (1989) (citing *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)). In that case, we reversed the defendant's conviction for the reason that he was not allowed to put on a witness whose testimony related to the proffered defense.

" 'The right to offer the testimony of witnesses . . . is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. . . .' " *McSwine*, 231 Neb. at 892, 438 N.W.2d at 781 (quoting *Washington v. Texas*, 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967)).

Of course, defendants in criminal cases have no right to present irrelevant evidence or adduce evidence from an incompetent witness. *McSwine, supra*. As discussed above, the testimony of the school board's president regarding prior implied or general consent was relevant. Accordingly, Fahlk

was partially deprived of his right to present a defense to the charge of theft.

CLOSING ARGUMENT COMMENT REGARDING MARITAL PRIVILEGE

Fahlk asserts that the Court of Appeals erred in holding that Fahlk failed to preserve any error for appellate review arising from the State's reference to the assertion of the marital privilege in its closing argument. This assignment of error arises out of the inconsistent testimony of the defendant's daughter, Nicole Fahlk. During direct examination, Nicole testified that her father did not bring a computer printer to her dorm on August 23, 1991. However, earlier in her testimony, Nicole had stated that her father came to her dorm a few weeks after school started and exchanged a gray printer for a white printer. The Fahlk family printer was white. The school district's printer was gray. During cross-examination, Nicole stated that her father had delivered the white printer to her dorm room on the day she moved in.

The prosecutor, during his rebuttal closing argument for the State, commented:

> Poor Nicole got to go home tonight, but she said [sic] up here and testified that her dad only came down there two times with printers; once after Labor Day — we all know when Labor Day is — and once on April 5. He didn't come down there on the 23rd. If he did, there was a third person who's [sic] there. You didn't hear from the third person, did you? It's Mrs. Fahlk.

Fahlk's counsel timely objected and was overruled. The court denied Fahlk's request to admonish the jury.

Comment regarding the assertion of marital privilege is prosecutorial misconduct. The claim of a privilege is not a permissible subject of comment by judge or counsel. Neb. Evid. R. 513, Neb. Rev. Stat. § 27-513 (Reissue 1989).

However, Fahlk failed to preserve for appellate review any error arising from the prosecutor's misconduct. " 'When a party has knowledge during trial of irregularity or misconduct, he must timely assert his right to a mistrial.' " *State v. Morrow*, 237 Neb. 653, 661, 467 N.W.2d 63, 69 (1991) (quoting *State v. Archbold*, 217 Neb. 345, 350 N.W.2d 500 (1984)). "One may

not waive an error, gamble on a favorable result, and, upon obtaining an unfavorable result, assert the previously waived error." *State v. Myers*, 244 Neb. 905, 915, 510 N.W.2d 58, 67 (1994). Fahlk's failure to move for a mistrial waived any error resulting from the prosecutor's misconduct.

IMPROPER REBUTTAL

In his third assignment of error, Fahlk asserts that the Court of Appeals erroneously held that Fahlk's objection to the State's rebuttal evidence was inadequate to preserve the error for appellate review. Although the Court of Appeals agreed that the testimony was improper rebuttal, it reached that conclusion on the basis of different grounds than those urged by Fahlk at trial and in his brief to the Court of Appeals.

This assignment of error arose out of the testimony of Rathe, who was called by the State as a rebuttal witness at the end of trial. Rathe, a key witness against Fahlk, testified that Fahlk called her three times on October 6, 1992, a week before trial. Rathe's home was equipped with a caller identification device. The State produced three photographs of the device which indicated that calls had been placed from Fahlk's home telephone number to Rathe.

Rathe's rebuttal testimony contradicts Fahlk's testimony during his cross-examination. On cross, the State asked Fahlk if he had placed any phone calls to Rathe on October 6, 1992. Fahlk responded that he did not remember making any calls, and in response to two subsequent questions simply responded, "No," that he had not placed any calls to Rathe.

At trial, Fahlk objected to Rathe's rebuttal testimony on grounds of relevancy and improper rebuttal. Fahlk's request for a continuing objection was granted. After Rathe was excused, a conference was held outside the presence of the jury. The court refused Fahlk's request to present surrebuttal witnesses whose testimony would attempt to establish that Fahlk was not at home at the time the phone calls were made. At the end of that discussion, Fahlk moved for a mistrial "based on the Court's rulings on admitting the rebuttal evidence, refusing to strike that evidence on the motion, and/or refusing to allow surrebuttal." The motion was denied.

In his brief to the Court of Appeals, Fahlk argued that the trial court abused its discretion in allowing the State's rebuttal evidence. In support of his argument, Fahlk asserted that "[r]ebuttal evidence is confined to that which explains, disproves, or counteracts evidence introduced by the adverse party." *Wright v. Forney*, 233 Neb. 258, 260, 444 N.W.2d 895, 896 (1989) (citing *Cromer v. Farmland Service Coop, Inc.*, 198 Neb. 355, 252 N.W.2d 635 (1977)).

Fahlk contends that he did not introduce any evidence regarding the alleged calls to Rathe. The only testimony regarding the calls was elicited by the State during cross-examination. Fahlk argued to the Court of Appeals that Rathe's testimony was improper rebuttal because it was not offered to explain, disprove, or counteract any evidence that had been offered by the defense. Fahlk further asserted that Rathe's rebuttal testimony was improper because it gave the State the opportunity to present evidence that should have been presented in its case in chief.

The Court of Appeals agreed with Fahlk that Rathe's testimony was improper rebuttal, but rested its decision on a different rule of law than that argued by Fahlk. See *State v. Fahlk*, 2 Neb. App. 421, 510 N.W.2d 97 (1993). The Court of Appeals stated that it was "clear that Rathe's testimony was offered solely to attack Fahlk's credibility by showing that Fahlk's earlier denial of making calls to Rathe's phone number on the afternoon of October 6, 1992, was untrue." 2 Neb. App. at 433, 510 N.W.2d at 104. The Court of Appeals noted that extrinsic evidence of specific instances of the conduct of a witness, other than conviction of crimes in some situations, may not be used for the purpose of attacking a witness' credibility. See Neb. Evid. R. 608(2), Neb. Rev. Stat. § 27-608(2) (Reissue 1989). Therefore, Rathe's testimony violated Neb. Evid. R. 608(2).

Further, the Court of Appeals noted that Fahlk had objected to Rathe's testimony on the grounds of relevancy and improper rebuttal. Neb. Evid. R. 103(1)(a) requires that an appellant claiming reversible error as the result of admission of evidence must have made a timely objection stating the specific objection, if a specific objection was not apparent from the

context. According to the Court of Appeals, Fahlk's objections on grounds of relevancy and improper rebuttal were not sufficient to raise an objection on grounds of a violation of Neb. Evid. R. 608(2). The court stated that Fahlk had failed to "state a specific objection by reference to a particular rule or by language contained in an evidential rule, as required by the rules of evidence and case law." *Fahlk*, 2 Neb. App. at 434, 510 N.W.2d at 105.

Although we agree with the Court of Appeals that the State's rebuttal testimony was objectionable under Neb. Evid. R. 608(2), Fahlk did not make an objection on those grounds or raise that argument to the Court of Appeals. We have previously admonished counsel regarding the function of proper objections. In *State v. Coleman*, 239 Neb. 800, 812, 478 N.W.2d 349, 357 (1992), we stated that

> a true objection does not wander among the Nebraska Evidence Rules in the hope of eventually ending its odyssey at the doorstep of a particular rule of evidence. In seeking to exclude evidence, counsel must adhere to a basic and straightforward approach: Tell the court the reason why the evidence is inadmissible!

Fahlk told the district court that he objected to Rathe's testimony on the grounds of improper rebuttal and relevancy. Fahlk's objections were timely and were followed by a motion to strike and a motion for mistrial. These motions were sufficient to preserve for appellate review his objections on the bases of relevancy and improper rebuttal.

"An objection, based on a specific ground and properly overruled, does not preserve a question for appellate review on any other ground." *State v. Schrein*, 244 Neb. 136, 147, 504 N.W.2d 827, 834 (1993) (citing *Havlicek v. State*, 101 Neb. 782, 165 N.W. 251 (1917)). In *Schrein*, the defendant objected on the basis of relevancy and was overruled. Therefore, on appeal, the defendant could not urge upon the court the issue of unfair prejudice. In *Fahlk*, the Court of Appeals committed a similar error in reverse. Fahlk argued improper rebuttal and relevancy, but the Court of Appeals looked only at Neb. Evid. R. 608(2).

In examining the record before us, we determine that the admission of Rathe's testimony was an abuse of discretion for

the reason that it was improper rebuttal. Ordinarily, a trial proceeds in the following order: "[T]he state must first produce its evidence; the defendant will then produce his evidence; . . . the state will then be confined to rebutting evidence, unless the court for good reason in furtherance of justice, shall permit it to offer evidence in chief." Neb. Rev. Stat. § 29-2016 (Reissue 1989). However, a trial court may in its discretion permit the introduction of evidence in rebuttal that is not strictly rebuttal evidence only for good reason and in the furtherance of justice. *State v. Pratt*, 197 Neb. 382, 249 N.W.2d 495 (1977) (quoting *State v. Keith*, 189 Neb. 536, 203 N.W.2d 500 (1973)).

This court has "defined proper rebuttal testimony in a criminal prosecution as ' " 'any testimony, otherwise competent, which tends to dispute the testimony offered on behalf of the accused as to a material fact . . . .' " ' " *State v. Esluer*, 215 Neb. 616, 621, 340 N.W.2d 152, 155 (1983) (citing *State v. Miller*, 213 Neb. 274, 328 N.W.2d 769 (1983)). "Rebuttal evidence is confined to new matters first introduced by the opposing party and not as an opportunity to bolster, corroborate, reiterate, or repeat the plaintiff's case in chief." *Stern v. On Time Freight Sys.*, 1 Neb. App. 302, 309, 493 N.W.2d 348, 353 (1992).

In *Esluer*, the defendant, charged with theft, had during cross-examination denied possession of a specific rare coin. Rebuttal testimony was offered establishing the fact that the coin had been in the possession of the defendant. The defendant argued that such evidence should have been offered in the State's case in chief. However, the rebuttal evidence pertained to a fact material to the theft charge and was offered to dispute defendant's testimony regarding that material fact. In *Esluer*, the rebuttal testimony was proper.

Rathe's testimony regarding the alleged phone calls on October 6, 1992, was not pertinent to any material fact in issue. There was no previous evidence that calls were made or not made and no evidence that Fahlk was even home when the calls were purportedly made to the witness from Fahlk's home. Therefore, the admission of Rathe's rebuttal testimony was an abuse of discretion. Erroneous admission of evidence is harmless error and does not require reversal if the evidence is

cumulative and other relevant evidence, properly admitted, supports the finding by the trier of fact. *State v. Coleman*, 239 Neb. 800, 478 N.W.2d 349 (1992). Here, the trial court erroneously admitted noncumulative evidence.

Erroneous admission of evidence in a criminal trial is not prejudicial if it can be said that the error was harmless beyond a reasonable doubt. See *State v. Hartmann*, 239 Neb. 300, 476 N.W.2d 209 (1991). See, also, *State v. Trackwell*, 244 Neb. 925, 509 N.W.2d 638 (1994). The sole purpose of Rathe's testimony was to attack the credibility of Fahlk. We cannot determine what damaging effect the testimony may have had upon the jury. Accordingly, because of the damage that Rathe's rebuttal testimony may have caused, its admission was prejudicial error. Fahlk is entitled to a new trial on this basis.

OBSTRUCTION OF JUSTICE

At the close of the State's case, Fahlk moved the trial court for a directed verdict on count II, obstruction of government operations. Fahlk argued that the State had failed to offer any proof of any actual or intended obstruction of any government operation. Further, Fahlk asserted there was no proof that Fahlk had falsified any document. The court denied Fahlk's motion for a directed verdict.

The Court of Appeals concluded that the evidence was sufficient beyond a reasonable doubt to sustain Fahlk's conviction of obstruction of government operations. See *State v. Fahlk*, 2 Neb. App. 421, 510 N.W.2d 97 (1993). In his last assignment of error, Fahlk asserts that the Court of Appeals erroneously affirmed his conviction of obstruction of government operations. Fahlk contends that the Court of Appeals reviewed the evidence under the wrong criminal statute.

The information against Fahlk charged him with a violation of § 28-901(1). Section 28-901(1) states:

> A person commits the offense of obstructing government operations if he intentionally obstructs, impairs, or perverts the administration of law or other governmental functions by force, violence, physical interference or obstacle, breach of official duty, or any other unlawful

act, except that this section does not apply to flight by a person charged with crime, refusal to submit to arrest, failure to perform a legal duty other than an official duty, or any other means of avoiding compliance with law without affirmative interference with governmental functions.

We turn now to the question of whether the weight of the evidence supported Fahlk's conviction of obstruction of government operations. On a claim of insufficiency of the evidence, an appellate court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. *State v. Cook*, 244 Neb. 751, 509 N.W.2d 200 (1993); *State v. Williams*, 239 Neb. 985, 480 N.W.2d 390 (1992). The burden of proof is on the State to prove all of the essential elements of the crime charged. *State v. Nuss*, 235 Neb. 107, 454 N.W.2d 482 (1990).

Section 28-901, the crime with which Fahlk was charged, states that a person commits the offense of obstruction of government operations if he intentionally obstructs, impairs, or perverts the administration of law or other governmental functions by force, violence, physical interference or obstacle, breach of official duty, or any other unlawful act. Therefore, to affirm his conviction, we must find that Fahlk (1) committed some physical act, (2) breached an official duty, or (3) committed some other unlawful act with the intent to obstruct the administration of justice.

A penal statute is given a strict construction which is sensible and prevents injustice or an absurd consequence. *State v. Moss*, 240 Neb. 21, 480 N.W.2d 198 (1992). This court has construed § 28-901 in *State v. Douglas*, 217 Neb. 199, 349 N.W.2d 870 (1984). In *Douglas*, we held that failure to volunteer information is not a physical act that violates § 28-901. Nor are mere words, even those words deliberately intended to frustrate law enforcement, physical acts under § 28-901. *Douglas, supra* (but see *id.* (Shanahan and Grant, JJ., and Moran, D.J., dissenting and stating that no physical act should be required to violate § 28-901)). The offense must consist of some physical interference, force, violence, or obstacle.

Fahlk asserts that his failure to volunteer information cannot

be deemed to be a violation of § 28-901 because failure to volunteer information is not a physical act. Fahlk is not accused of failing to volunteer information. Fahlk is accused of creating a false computer checkout sheet and giving it to Becker on April 10, 1992. These actions surpass failing to volunteer information but lack the element of force or violence contemplated by § 28-901.

Secondly, Fahlk's actions did not constitute a breach of official duty. Section 28-901 is virtually identical to Model Penal Code § 242.1 (1980). The comments to Model Penal Code § 242.1 state that the kind of official misconduct contemplated by that statute is "a particularly dangerous and reprehensible kind of official misconduct—purposeful obstruction of governmental function by breach of official duty." *Id.*, comment 4 at 206. For example, a public official who sought to undermine the operation of the government he or she purports to serve would violate Model Penal Code § 242.1. The alleged creation of a false checkout sheet does not rise to the level of official misconduct contemplated by § 28-901.

Finally, one can also be guilty of the offense of obstructing government operations if one commits an unlawful act with the intent to obstruct, impair, or pervert the administration of law. The comments to Model Penal Code § 242.1 define an "unlawful act" to be "any affirmative violation of legal duty, whether imposed by criminal statute, tort law, or administrative regulation." *Id.*, comment 5 at 206. Had the State established that Fahlk created the checkout sheet with the intent to offer false physical evidence to Becker, the evidence might have supported a conviction of violation of Neb. Rev. Stat. § 28-922 (Reissue 1989) (tampering with physical evidence), the statute cited by the Court of Appeals in its opinion. See *State v. Fahlk*, 2 Neb. App. 421, 510 N.W.2d 97 (1993).

However, Fahlk was not charged with a violation of § 28-922 and that charge was not put before the jury. It was therefore error for the Court of Appeals to say Fahlk violated § 28-922, which would constitute a violation of § 28-901, which Fahlk was charged with violating.

The burden was on the State to prove all the essential elements of the crime of obstruction of government operations. As stated above, the State failed to establish that the alleged creation of a false checkout sheet was a physical act, breach of official duty, or an unlawful act. The evidence is not sufficient to support a conviction of the crime of obstruction of government operations.

CONCLUSION

As to Fahlk's conviction of theft by unlawful taking, the district court committed harmless error in refusing to allow Fahlk's direct testimony regarding his alleged lack of intent to permanently deprive the school district of the computer printer. But the district court abused its discretion by excluding evidence that the school board may have impliedly consented to the taking. Further, the admission of improper rebuttal testimony that a caller identification device showed calls from Fahlk's home was prejudicial error. Therefore, Fahlk's conviction under § 28-511(1) of theft by unlawful taking is reversed, and Fahlk is entitled to a new trial on count I.

Secondly, as to Fahlk's conviction of obstruction of government operations, the evidence before us does not meet the requisite elements of § 28-901(1) and is insufficient to support Fahlk's conviction. Accordingly, Fahlk's conviction under § 28-901(1) is reversed, and the cause is remanded with directions to dismiss count II.

JUDGMENT ON COUNT I REVERSED AND REMANDED FOR A NEW TRIAL.
JUDGMENT ON COUNT II REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

WRIGHT, J., participating on briefs.

NEBRASKA IRRIGATION, INC., APPELLEE, V. HOWARD KOCH, DOING BUSINESS AS NEBRASKA IRRIGATION SALES & EQUIPMENT, A SOLE PROPRIETORSHIP, APPELLANT.

523 N.W.2d 676

Filed November 18, 1994. No. S-93-476.

1. **Injunction: Equity.** An action for injunction sounds in equity.
2. **Equity: Appeal and Error.** In an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Actions: Injunction.** An injunction is an extraordinary remedy and ordinarily should not be granted except in a clear case where there is actual and substantial injury. Such a remedy should not be granted unless the right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice.
4. **Names: Proof.** In a case for trade name infringement, the plaintiff has the burden to prove by a preponderance of the evidence the existence of (1) a valid trade name entitled to protection, and (2) a substantial similarity between the plaintiff's and the defendant's names, which would result in either actual or probable deception or confusion by ordinary persons dealing with ordinary caution.
5. **Names: Words and Phrases.** Generic words, whose primary meaning is merely descriptive of the business to which they are applied or which are such as are in common use for that purpose, cannot be exclusively appropriated as a trade name.
6. **Names.** As a matter of law, no one is entitled to the exclusive use of descriptive adjectives of the language. These terms may be used by all the world in an honestly descriptive and nondescriptive manner.
7. _____. A combination of geographical names with other symbols or marks, even though the geographical name itself may not be a valid trademark, may be protected against unfair competition.
8. **Names: Proof.** The evil sought to be eliminated by trade name protection is confusion. The burden is upon the plaintiff to show whether the likelihood of such confusion exists.
9. _____: _____. The likelihood of confusion in the use of trade names can be shown by presenting circumstances from which courts might conclude that persons are likely to transact business with one party under the belief they are dealing with another party. If the similarity is such as to mislead purchasers or those doing business with the company, acting with ordinary and reasonable caution, or if the similarity is calculated to deceive the ordinary buyer in ordinary conditions, it is sufficient to entitle the one first adopting the name to relief.
10. **Names.** No precise rules can be laid down to determine whether trade name

confusion exists or is likely to arise. Among the considerations are (1) degree of similarity in the products offered for sale; (2) geographic separation of the two enterprises and the extent to which their trade areas overlap; (3) extent to which the stores are in actual competition; (4) duration of use without actual confusion; and (5) actual similarity, visually and phonetically, between the two trade names.

11. _____. One trade name is not an infringement on another trade name if ordinary attention of persons would disclose the difference.

Appeal from the District Court for Chase County: JOHN J. BATTERSHELL, Judge. Judgment vacated, and cause remanded with direction.

Tim O'Neill and Gregory D. Barton, of Harding & Ogborn, for appellant.

H. Daniel Smith, of Sherrets Smith & Gardner, P.C., for appellee.

HASTINGS, C.J., WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ., and BOSLAUGH, J., Retired.

FAHRNBRUCH, J.

Howard Koch appeals an order of the district court for Chase County enjoining his use of the trade name "Nebraska Irrigation Sales & Equipment" to identify his business.

Plaintiff-appellee, Nebraska Irrigation, Inc., claimed in its petition for injunction that Koch's trade name is "deceptively and confusingly" similar to plaintiff-appellee's trade name "Nebraska Irrigation."

We vacate the judgment of the district court and remand the cause to that court with direction to dismiss plaintiff-appellee's petition.

FACTS

Plaintiff-appellee was incorporated on April 27, 1979. However, the owners had used the trade name "Nebraska Irrigation" since approximately 1975 in connection with the business of selling parts and after-market equipment for center-pivot irrigation systems. Plaintiff-appellee does not sell or install complete irrigation systems.

Plaintiff-appellee has 1,200 customers located throughout the Western United States, Mexico, Central America, the

Middle East, Europe, and Canada. Its manufacturing plant is located in Columbus, Nebraska, and 400 of its customers are located in Nebraska. Annual sales approximate $2.5 million.

In January 1988, defendant-appellant, Koch, began using the trade name "Nebraska Irrigation Sales & Equipment" for the business he acquired from Walter Reinke. Reinke had been doing business as Nebraska Irrigation Sales & Engineering since the early 1980's. Koch uses the trade name "Nebraska Irrigation Sales & Equipment" under an oral license from his wife, April Koch, who registered the trade name with Nebraska's Secretary of State on March 9, 1988. Since 1988, Koch has spent over $80,000 advertising under the name "Nebraska Irrigation Sales & Equipment."

Koch is a retailer of complete irrigation systems and parts and services. Ninety percent of his sales are new installations of Reinke Irrigation Systems. The other 10 percent of Koch's sales consist of services and replacement parts. The annual sales of Koch's business are approximately $900,000.

Koch's sales and service area is confined to a 100-mile radius of Imperial, Nebraska, with retail outlets located in Imperial and Bartley, Nebraska. "Several thousand dollars" of plaintiff-appellee's $2.5 million in annual sales are also within a 100-mile radius of Imperial.

As stated, plaintiff-appellee brought an action in equity seeking to permanently enjoin Koch from using the name "Nebraska Irrigation" in his business. In granting the injunction, the district court found that the name "Nebraska Irrigation" is not merely descriptive but is a combination of "Nebraska" and "irrigation," which is protected under statute and common law. The trial court also found that confusion does exist and that confusion is likely by the general public when both trade names are used. The trial court further found that the parties compete in the same area and sell basically the same types of goods and that Koch's use of the name "Nebraska Irrigation Sales & Equipment" exploits a name to the damage of plaintiff-appellee.

Koch timely appealed to the Nebraska Court of Appeals. The case was removed to this court pursuant to our authority to regulate the caseloads of the appellate courts of this state.

ASSIGNMENTS OF ERROR

Koch claims that the district court erred by finding that (1) the name "Nebraska Irrigation" is not merely descriptive; (2) the name "Nebraska Irrigation" is protected under statute and also common law; (3) confusion does exist and that confusion is likely because the general public will not be able to tell the difference between "Nebraska Irrigation" and "Nebraska Irrigation Sales & Equipment"; (4) the parties sell basically the same types of goods; (5) Koch's use of the trade name "Nebraska Irrigation Sales & Equipment" exploits, to plaintiff-appellee's damage, plaintiff-appellee's trade name; and (6) plaintiff-appellee's right to an injunction is clear—the damage to plaintiff-appellee is irreparable and will continue to be irreparable unless an injunction is issued, and the remedy at law is inadequate. Koch also claims that the trial court erred in failing to address and hold that plaintiff-appellee's claim is barred by the doctrine of laches.

SCOPE OF REVIEW

An action for injunction sounds in equity. *Abboud v. Lakeview, Inc.*, 237 Neb. 326, 466 N.W.2d 442 (1991). In an appeal of an equity action, an appellate court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court, provided, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *CAE Vanguard, Inc. v. Newman, ante* p. 334, 518 N.W.2d 652 (1994); *Whitehead Oil Co. v. City of Lincoln*, 245 Neb. 660, 515 N.W.2d 390 (1994).

An injunction is an extraordinary remedy and ordinarily should not be granted except in a clear case where there is actual and substantial injury. *Nebraska Pub. Power Dist. v. Lockard*, 237 Neb. 589, 467 N.W.2d 53 (1991). Such a remedy should not be granted unless the right is clear, the damage is irreparable, and the remedy at law is inadequate to prevent a failure of justice. *Abboud, supra.*

ANALYSIS

In a case for trade name infringement, the plaintiff has the burden to prove by a preponderance of the evidence the existence of (1) a valid trade name entitled to protection, and (2) a substantial similarity between the plaintiff's and the defendant's names, which would result in either actual or probable deception or confusion by ordinary persons dealing with ordinary caution. See, *Dahms v. Jacobs*, 201 Neb. 745, 272 N.W.2d 43 (1978); *Ransdell v. Sixth Street Food Store*, 174 Neb. 875, 120 N.W.2d 290 (1963).

We turn now to Koch's first and second assignments of error claiming that the district court erred in not finding the name "Nebraska Irrigation" merely descriptive and in determining that the name is a protectable trade name. Generic words, whose primary meaning is merely descriptive of the business to which they are applied or which are such as are in common use for that purpose, cannot be exclusively appropriated as a trade name. *Personal Finance Co. v. Personal Loan Service*, 133 Neb. 373, 275 N.W. 324 (1937). "As a matter of law, no one is entitled to the exclusive use of descriptive adjectives of the language." *Id.* at 379, 275 N.W. at 327. These terms may be used by all the world in an honestly descriptive and nondescriptive manner. *Personal Finance Co., supra.*

The name "Nebraska Irrigation" uses the geographic term "Nebraska" and a descriptive term "irrigation." "[A] combination of geographical names with other symbols or marks, even though the geographical name itself may not be a valid trade mark, may be protected against unfair competition." *Ransdell*, 174 Neb. at 885, 120 N.W.2d at 296. Thus, the combination of "Nebraska" and "Irrigation" is a protectable trade name against unfair competition.

The next step is to determine whether there has been an infringement made upon plaintiff-appellee's trade name. The evil sought to be eliminated by trade name protection is confusion. *Dahms, supra.* The burden is upon the plaintiff to show whether the likelihood of such confusion exists. *Id.*

In his third assignment of error, Koch claims that the district court erred in finding in substance that confusion exists and that confusion by the general public is likely if Koch is

permitted to use the name "Nebraska Irrigation Sales & Equipment" while plaintiff-appellee uses its trade name "Nebraska Irrigation." The likelihood of confusion in the use of trade names can be shown by presenting circumstances from which courts might conclude that persons are likely to transact business with one party under the belief they are dealing with another party. *Id.* If the similarity is such as to mislead purchasers or those doing business with the company, acting with ordinary and reasonable caution, or if the similarity is calculated to deceive the ordinary buyer in ordinary conditions, it is sufficient to entitle the one first adopting the name to relief. *Ransdell, supra.*

This court set standards for determining whether confusion exists or is likely to arise:

> No precise rules can be laid down to determine whether [trade name] confusion exists or is likely to arise. Among the considerations are: (1) Degree of similarity in the products offered for sale; (2) geographic separation of the two enterprises and the extent to which their trade areas overlap; (3) extent to which the stores are in actual competition; (4) duration of use without actual confusion; and (5) the actual similarity, visually and phonetically, between the two trade names.

Dahms, 201 Neb. at 747, 272 N.W.2d at 44.

Consideration of each factor is necessary to determine if confusion exists or is likely to exist in the present case.

We first turn to the degree of similarity between the products offered for sale by both plaintiff-appellee and Koch. Both parties sell irrigation equipment. However, over 90 percent of Koch's sales involve the sale of complete irrigation systems, which are the Reinke brand exclusively. Plaintiff-appellee sells primarily parts to "resellers." Further, Koch regularly provides repair and installation services, and plaintiff-appellee does not. Thus, the degree of similarity between products offered for sale in the two businesses is not great.

Next, we must consider the geographic separation of the two enterprises and the extent to which their trade areas overlap. The companies operate at different locations. Koch operates out of Imperial and Bartley, while plaintiff-appellee operates

out of Columbus. Plaintiff-appellee's trade area extends throughout the Western United States as well as to foreign countries while Koch's trade area, within a 100-mile radius of Imperial, overlaps a relatively small portion of plaintiff-appellee's trade area.

The next factor, the extent to which the businesses are in actual competition, should be considered to determine how much weight is to be given to the overlap in trade areas. Koch argues that the district court erred in finding that the parties sell basically the same types of goods. Koch is a retailer of complete irrigation systems, with annual sales of approximately $900,000. Plaintiff-appellee is primarily a wholesaler of parts and "only several thousand dollars" of its $2.5 million annual sales are within a 100-mile radius of Imperial.

Roger Bettenhausen, president of plaintiff-appellee, admitted in his trial testimony that it is apparent from Koch's advertisements that Nebraska Irrigation Sales & Equipment sells directly to the public. Bettenhausen also testified that plaintiff-appellee sells substantially through "resellers." The record reflects that plaintiff-appellee and Nebraska Irrigation Sales & Equipment are not selling their products to the same customers, and the extent to which the businesses are in actual competition is minimal.

The fourth factor to consider is the duration of the use of a name without actual confusion. Bettenhausen testified that on numerous occasions he was held accountable for prices Koch listed in Nebraska Irrigation Sales & Equipment advertisements. However, Bettenhausen did not set forth any specific instances of confusion.

The record fails to establish that Koch intended to avail himself of the "Nebraska Irrigation" reputation and to transact business as "Nebraska Irrigation." Koch testified he was not using the name "Nebraska Irrigation Sales & Equipment" to take advantage of the reputation of "Nebraska Irrigation." Bettenhausen admitted he was unaware of any instance where Koch or Koch's employees intended to transact business as "Nebraska Irrigation." The record reflects that Koch has used the trade name "Nebraska Irrigation Sales & Equipment" since January 1988 without any evidence of confusion.

Finally, we must look at the actual similarity between the trade names. In *Dahms v. Jacobs*, 201 Neb. 745, 272 N.W.2d 43 (1978), we said the degree of similarity between the names "The Depot" and "The Denim Depot" was the determinative issue. The facts in that case involved some overlap of trade areas of the two companies, a substantial similarity of product in certain areas, and some competition. However, this court gave greater weight to its finding that the names "The Depot" and "The Denim Depot" were not so similar that they were likely to cause confusion in the minds of the public. This court found that whether seen side by side or at different times, the names were distinguishable.

In *Miskell v. Prokop*, 58 Neb. 628, 79 N.W. 552 (1899), we found that there was a distinction between the business names "New York Racket Store" and "Racket Store." This court found a careful examination of the words would prevent the public from being deceived, although the two businesses were located in the same town and dealing in similar businesses.

In the case at hand, we find that a careful examination of the names "Nebraska Irrigation" and "Nebraska Irrigation Sales & Equipment" would prevent the public from being deceived. We find the names, whether seen side by side, or at different times, are distinguishable.

Although in the present case there exists an overlap of trade areas of plaintiff-appellee and Nebraska Irrigation Sales & Equipment, we find that the products offered for sale by the two companies are not substantially similar and that the parties do not compete for the same customers. Plaintiff-appellee deals almost exclusively in component parts and after-market equipment and sells to "resellers," while Nebraska Irrigation Sales & Equipment sells complete irrigation systems through its retail stores. This court gives greater weight to the fact that the two names are not so similar that they are likely to cause confusion in the minds of the public. One trade name is not an infringement on another trade name if ordinary attention of persons would disclose the difference. *Dahms, supra.* Plaintiff-appellee has not proven a clear right to injunctive relief against Koch's use of the trade name "Nebraska Irrigation Sales & Equipment." This being dispositive of the case, we need

not consider the remaining assignment of error.

Plaintiff-appellee has failed to meet its burden to show, by a preponderance of the evidence, either actual or probable confusion in the use of the trade names "Nebraska Irrigation" and "Nebraska Irrigation Sales & Equipment." We, therefore, vacate the judgment of the district court and remand the cause to that court with direction to dismiss plaintiff-appellee's petition.

JUDGMENT VACATED, AND CAUSE REMANDED WITH DIRECTION.

STATE OF NEBRASKA, APPELLEE, V. RANDALL D. WRAGGE, APPELLANT.

524 N.W.2d 54

Filed November 18, 1994. No. S-93-897.

1. **Appeal and Error.** An appellate court may, at its option, consider plain error; such an error is one which is plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.
2. **Statutes: Appeal and Error.** An appellate court has an obligation to ascertain the meaning of a statute independently and without regard for a lower court's decision, since statutory interpretation is a question of law.
3. **Statutes.** In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning; when the words of a statute are plain, direct, and unambiguous, no interpretation is necessary or will be indulged to ascertain their meaning.
4. _____. A statute which specifies the object of its operation excludes therefrom every object not expressly mentioned (expressio unius est exclusio alterius).
5. **Criminal Law: Probation and Parole: Sentences.** The violation of probation is not itself a crime; rather, the statute provides a mechanism whereby the previous probation is revoked and the court may impose a new sentence for the crime for which the offender was originally convicted.
6. **Sentences: Probation and Parole.** One whose probation is revoked is subject to sentencing under the penal statute in effect at the time of conviction.

7. **Sentences: Appeal and Error.** A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion.

Petition for further review from the Nebraska Court of Appeals, HANNON and MILLER-LERMAN, Judges, and HOWARD, District Judge, Retired, on appeal thereto from the District Court for Kearney County, STEPHEN ILLINGWORTH, Judge. Judgment of Court of Appeals affirmed as modified.

John C. Vanderslice for appellant.

Don Stenberg, Attorney General, and Marilyn B. Hutchinson for appellee.

HASTINGS, C.J., WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ., and BOSLAUGH, J., Retired.

CAPORALE, J.

The district court had adjudged the defendant-appellant, Randall D. Wragge, guilty of attempted first degree sexual assault for an act he committed on June 12, 1989, and had placed him on probation. Wragge thereafter drank alcohol, in violation of a condition of the probation; as a consequence, the district court revoked the probation and sentenced him to imprisonment for a period of 5 to 6 years "under [the Convicted Sex Offender Act, Neb. Rev. Stat. § 29-2922 et seq. (Cum. Supp. 1994)] which would permit treatment of [Wragge]." Wragge then appealed to the Nebraska Court of Appeals, asserting (1) that as the Convicted Sex Offender Act did not exist at the time of the 1989 offense, it could not be applied to him, and (2) that the sentence imposed was excessive. The Court of Appeals affirmed the judgment of the district court, *State v. Wragge*, 94 NCA No. 23, case No. A-93-897 (not designated for permanent publication). Wragge then successfully petitioned for further review by this court. We now modify, and as modified affirm, the judgment of the Court of Appeals.

As a result of his conduct in 1989, Wragge pled no contest to attempted first degree sexual assault, a violation of Neb. Rev. Stat. §§ 28-201 and 28-319(1)(c) (Reissue 1989), which brought into play the then-existing mentally disordered sex offender act, formerly Neb. Rev. Stat. § 29-2911 et seq. (Reissue 1989).

Two psychiatrists and one psychologist determined that Wragge had no mental disorder and therefore was not a mentally disordered sex offender. While the district court did not explicitly find whether Wragge was or was not such a sex offender, it did so implicitly by not sentencing him as such.

By the time Wragge violated his probation on or about April 6, 1993, the mentally disordered sex offender act had been replaced by the Convicted Sex Offender Act, § 29-2922 et seq. (Cum. Supp. 1994), 1992 Neb. Laws, L.B. 523; Neb. Const. art. III, § 27.

In connection with the first assignment of error, Wragge argues that ex post facto considerations constitutionally prohibit the application of the Convicted Sex Offender Act to him. However, we do not reach that claim, for the matter is resolved in Wragge's favor statutorily.

Although Wragge failed to make the statutory argument, it is within the reach of his assignment of error, and we elect to consider the omission of the argument as plain error under the rule that an appellate court may, at its option, consider plain error. Such an error is one which is plainly evident from the record and of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process. *State v. Flye*, 245 Neb. 495, 513 N.W.2d 526 (1994); *State v. Ristau*, 245 Neb. 52, 511 N.W.2d 83 (1994); Neb. Rev. Stat. § 25-1919 (Cum. Supp. 1994).

This court has an obligation to ascertain the meaning of a statute independently and without regard for a lower court's decision, since statutory interpretation is a question of law. *State v. Sell*, 244 Neb. 618, 508 N.W.2d 273 (1993); *State v. Saulsbury*, 243 Neb. 227, 498 N.W.2d 338 (1993); *State v. Katzman*, 228 Neb. 851, 424 N.W.2d 852 (1988).

In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning. When the words of a statute are plain, direct, and unambiguous, no interpretation is necessary or will be indulged to ascertain their meaning. *State v. Flye, supra*; *State v. Chambers*, 242 Neb. 124, 493 N.W.2d 328 (1992); *State v. Stein*, 241 Neb. 225, 486 N.W.2d 921 (1992).

In general, the Convicted Sex Offender Act provides for the

treatment of convicted sex offenders by the Department of Public Institutions and provides for the imposition of various penal alternatives. §§ 29-2925 through 29-2933. (One found guilty of attempted first degree sexual assault is defined as a convicted sex offender. § 29-2923(2).) Further, it specifies how to deal with those previously committed as mentally disordered sex offenders. § 29-2934. However, it is silent with respect to those previously convicted of a sexual offense but determined not to be mentally disordered. Thus, under the maxim that a statute which specifies the object of its operation excludes therefrom every object not expressly mentioned (expressio unius est exclusio alterius), we conclude that the Convicted Sex Offender Act does not apply to the latter category of previously convicted sex offenders. See, *State Bd. of Ag. v. State Racing Comm.*, 239 Neb. 762, 478 N.W.2d 270 (1992); *Nebraska City Education Assn. v. School Dist. of Nebraska City*, 201 Neb. 303, 267 N.W.2d 530 (1978). Cf. *Curry v. State ex rel. Stenberg*, 242 Neb. 695, 496 N.W.2d 512 (1993) (fact activity not specifically covered by one provision does not, in and of itself, necessarily mean activity not covered by more general provision).

Furthermore, Neb. Rev. Stat. § 29-2268(1) (Reissue 1989) provides that if an offender violates a condition of probation, the court "may revoke the probation and impose on the offender such new sentence as might have been imposed originally for the crime of which he was convicted." The violation of probation is not itself a crime; rather, the statute provides a mechanism whereby the previous probation is revoked and the court may impose a new sentence for the crime for which he was originally convicted. See *State v. Painter*, 223 Neb. 808, 394 N.W.2d 292 (1986).

Accordingly, one whose probation is revoked is subject to sentencing under the statute in effect at the time of conviction. *State v. Jacobson*, 221 Neb. 639, 379 N.W.2d 772 (1986). The court can impose such sentence as it could have imposed originally for the crime. *Id.*; *State v. Osterman*, 197 Neb. 727, 250 N.W.2d 654 (1977); *State v. Williams*, 194 Neb. 483, 233 N.W.2d 772 (1975).

Thus, in *Jacobson, supra*, we held that the trial court was

correct in sentencing a probationer who had violated his probation under the version of the driving while intoxicated statute in effect at the time of the offense.

Likewise, in *Painter*, 223 Neb. at 810, 394 N.W.2d at 294, we proclaimed that once a court determines that a probation violation has occurred and probation should be revoked, "§ 29-2268(1) clearly provides that the court is to impose a *new* sentence for the crime of which the defendant was *originally convicted*." (Emphasis in original.)

Consequently, the first assignment of error is meritorious.

At the time of the 1989 offense, former § 29-2914 provided that one determined not to be a mentally disordered sex offender was to be sentenced as provided by law for the offense committed. Under the provisions of §§ 28-201 and 28-319(1)(c), the attempted first degree sexual assault constituted a Class III felony, punishable by imprisonment for a period of 1 to 20 years, Neb. Rev. Stat. § 28-105 (Reissue 1989). Thus, the sentence imposed is well within the limits set by statute. The longstanding and consistently applied rule is that a sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion. *State v. Wood*, 245 Neb. 63, 511 N.W.2d 90 (1994); *State v. Philipps*, 242 Neb. 894, 496 N.W.2d 874 (1993).

Even without considering Wragge's other convictions, in view of the facts that he had been convicted of a sexual offense prior to the 1989 offense and has failed to adhere to the condition of the probation arising out of the latter offense, it cannot be said the district court abused its discretion in sentencing Wragge as it did.

The second assignment of error is therefore without merit.

Accordingly, we modify the sentence imposed by the district court by vacating the portion thereof which subjects Wragge to the provisions of the Convicted Sex Offender Act and, as so modified, affirm the judgment of the Court of Appeals.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. JARON DEAN, APPELLANT.

523 N.W.2d 681

Filed November 18, 1994. No. S-93-929.

1. **Collateral Estoppel.** The applicability of the doctrine of collateral estoppel constitutes a question of law.
2. **Judgments: Appeal and Error.** With regard to a question of law, an appellate court is obligated to reach a conclusion independent from the lower court's conclusion.
3. **Criminal Law: Judgments: Collateral Estoppel: Double Jeopardy.** When an identical issue was decided in a prior action, there was a judgment on the merits which was final, the party against whom the doctrine is to be applied is a party or is in privity with a party to the prior action, and there was an opportunity to fully and fairly litigate in the prior litigation, concepts of double jeopardy may make collateral estoppel applicable in a criminal case.
4. **Criminal Law: Collateral Estoppel: Proof: Double Jeopardy.** A criminal defendant, relying on collateral estoppel in relation to constitutional protection against double jeopardy in a present proceeding, has the burden to prove that the particular issue which is sought to be relitigated, but which is constitutionally foreclosed by the Double Jeopardy Clause, was necessarily or actually determined in a previously concluded criminal proceeding.
5. **Constitutional Law: Criminal Law: Collateral Estoppel.** Nonmutual collateral estoppel is not afforded a nonparty criminal defendant by either the federal or Nebraska Constitutions.
6. **Motions to Suppress: Appeal and Error.** In determining the correctness of a trial court's ruling on a motion to suppress, an appellate court will uphold the trial court's findings of fact unless those findings are clearly erroneous.
7. _____: _____. In determining the correctness of a trial court's ruling on a motion to suppress, an appellate court will not reweigh or resolve conflicts in the evidence.
8. **Constitutional Law: Right to Counsel.** The Fifth Amendment to the U.S. Constitution includes the right to be assisted by counsel during custodial interrogation.
9. _____: _____. The Sixth Amendment to the U.S. Constitution gives one accused of a crime the right to the assistance of counsel.
10. _____: _____. Under Neb. Const. art. I, § 11, one accused of a crime has the right to appear and defend in person or by counsel.
11. **Constitutional Law: Right to Counsel: Waiver.** An effective waiver of an accused's Fifth Amendment right to counsel has two distinct dimensions. First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception; second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.
12. _____: _____: _____. A waiver of the Sixth Amendment right to counsel is valid only when it reflects an intentional relinquishment or abandonment of a

known right or privilege; therefore, the key inquiry is whether one who waived the Sixth Amendment right was sufficiently aware of the right to have counsel present during questioning and of the possible consequences of a decision to forgo the aid of counsel.

13. _____: _____: _____. Neither the Fifth Amendment nor the Sixth Amendment right to counsel is superior to or greater than the other, and it is no more difficult to waive the Sixth Amendment right than it is to waive the Fifth Amendment right.
14. **Expert Witnesses: Appeal and Error.** The admission of expert testimony is ordinarily within the discretion of the trial court, and its ruling will be upheld in the absence of an abuse of discretion.
15. **Rules of Evidence: Expert Witnesses.** Under Neb. Rev. Stat. § 27-702 (Reissue 1989), Neb. Evid. R. 702, when the proffered opinion evidence relates to a topic which has been judicially recognized as a proper subject for expert testimony, the trial court need only consider whether this evidence will aid the jury in deciding the particular issues in the case; however, when a trial court is faced with an offer of a novel form of expertise which has not yet received judicial sanction, the trial court must determine as an initial matter whether the new technique or principle is sufficiently reliable as to aid the jury in reaching accurate results.
16. _____: _____. The admissibility of an expert's testimony, including an opinion, which is based on a scientific principle or is based on a technique or process which utilizes or applies a scientific principle, depends on general acceptance of the principle, technique, or process in the relevant scientific community.
17. **Expert Witnesses.** *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, _____ U.S. _____, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), does not apply to state court decisions; this state adheres to the standard for admitting expert scientific evidence accorded in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).
18. **Rules of Evidence: Words and Phrases.** Evidence of a test result cannot be characterized as "scientific" or qualify as "technical or other specialized knowledge," and thus within the purview of Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1989), unless and until it is established that the test result demonstrates what it is claimed to demonstrate.
19. **Homicide: Intent.** Malice is an essential element of murder in the second degree.
20. **Intent.** Whether malice exists is a factual issue.
21. **Judgments.** Whether a finding is sufficient to support a judgment is a question of law.
22. **Homicide: Intent: Circumstantial Evidence.** Malice concerns the killer's state of mind and may thus be inferred from the words and acts of the defendant, the circumstances surrounding his or her conduct, and the evidence relating to the circumstances of the criminal act.
23. **Intent: Words and Phrases.** Malice is that condition of the mind which is manifested by the intentional doing of a wrongful act without just cause or excuse.
24. **Homicide: Evidence: Intent.** Evidence that one, intentionally and with malice, shot into a residence, lighted or unlighted, and that a death resulted is, in and of itself, sufficient to establish murder in the second degree.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Sean J. Brennan for appellant.

Don Stenberg, Attorney General, and Marilyn B. Hutchinson for appellee.

HASTINGS, C.J., WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ., and BOSLAUGH, J., Retired.

CAPORALE, J.

I. STATEMENT OF CASE

Following a bench trial, the defendant-appellant, JaRon Dean, was adjudged guilty of second degree murder and the use of a firearm to commit that felony. Inasmuch as he was sentenced to life imprisonment for the murder, his appeal was docketed in this court. See Neb. Rev. Stat. § 24-1106 (Cum. Supp. 1994). He asserts the trial court erred in (1) refusing to apply the doctrine of collateral estoppel, (2) overruling his motion to suppress his statements to the police, (3) receiving certain evidence, (4) failing to affirmatively find the existence of malice, and (5) finding the evidence otherwise sufficient to establish second degree murder. We affirm.

II. BACKGROUND

On October 22, 1992, Phillip Secret and Deron Haynes were involved in a dispute concerning an automobile accident with Haynes and the sister of Secret's girl friend. When Haynes took a gun from the trunk of his automobile, Secret retreated to his vehicle and left the scene.

Later that evening, Secret met with Dean, Leonard Anderson, Anthony Cates, and Gregory Pool at Anderson's house, where Secret brought out a blue bag containing a 12 gauge shotgun, a .22-caliber revolver, and an AK-47 rifle. Anderson had also brought a gun, a .380-caliber semiautomatic pistol. The group then drove to a trailer where they understood Haynes was living with his brother and another person. Two automobiles were parked near the trailer when the group initially drove by it, at which time lights were on inside the

middle part of the trailer. When the group drove by the trailer a second time, only one automobile remained parked near the trailer, and the lights were still on inside the middle section of the trailer. The group parked their automobile in back of the trailer and distributed the weapons. Cates armed himself with the shotgun, Pool selected the .22-caliber revolver, and Dean took the AK-47 rifle. Anderson kept his own .380-caliber semiautomatic pistol.

While the group approached the trailer, Keith Williams and others arrived. Pool and Dean then walked to the front of the trailer. Cates, Anderson, and Williams remained at the back of the trailer. The four armed men repeatedly shot their weapons into the lighted section of the trailer and then fled the scene.

Police later found Haynes' corpse inside the trailer. The pathologist who conducted the autopsy testified that the death resulted from a single gunshot wound to the chest and that the fatal bullet entered the victim's body on the right side toward the back of his armpit and left a small spherical wound. The exit wound was located on the left side of the victim's back and was slightly larger than the entrance wound, a fact which suggested a high-velocity missile. In the pathologist's opinion, the victim was killed by a small-caliber, high-velocity weapon. Of the weapons used by the gunmen, only the AK-47 rifle could fire such a high-velocity missile.

The firearms and tool mark examiner for the Nebraska State Patrol crime laboratory inserted a dowel into a bullet hole that penetrated both the exterior and interior walls on the west side of the trailer, thus establishing the angle at which the bullet making the hole entered. He then used a laser beam to reconstruct the path the bullet traveled. He placed a tripod where investigators found spent AK-47 rounds near the trailer, attached a laser tube and rifle scope to the tripod, and aligned the beam with the bullet hole. Thus aligned, the laser beam projected through the bullet hole and into the trailer under the right arm of a police officer, the same area in which the bullet entered the victim's body.

After being arraigned and having had an attorney appointed for him and while in custody at the Lincoln Correctional

Center, Dean used the communication system in his single-occupant cell and asked to talk to police Sgt. Gregory H. Sorensen, a longtime acquaintance. The correctional security officer receiving the request notified her supervisor, following which Sorensen was contacted.

At the suppression hearing, Sorensen testified that after learning of Dean's request, he went to the Lincoln Correctional Center and met with him. Notwithstanding that Dean had signed a form waiving his *Miranda* rights when taken into custody, Sorensen presented him with a second such form. The form advised Dean that he had a right to remain silent, that anything he said could and would be used against him in court, that he had a right to an attorney before answering any questions and to have the attorney present during questioning, and that if he could not afford an attorney, one would be appointed before questioning without any cost to him. In addition, Sorensen asked Dean if he understood each of his rights, and Dean said "yes." Sorensen then asked Dean if he was willing to talk with him and, upon receiving an affirmative reply, asked Dean to go ahead and tell Sorensen what he wanted. Dean asked if they could make a deal, and Sorensen replied that he could make no deal, that only the county attorney could do that. Sorensen then asked what possessed Dean to do something like this. Dean replied that he did not know, but wanted to blame drug use. When Sorensen asked why he would shoot into a trailer, Dean again said that he did not know and that he thought he was shooting high enough not to hit anyone. He knew there was someone in the trailer earlier, but thought the trailer was empty at the time of the shooting. Sorensen repeated Dean's statements at trial.

All four gunmen were charged with first degree murder and with the use of a firearm to commit a felony. In a separate trial, Anderson was convicted of aiding and abetting Dean in the commission of second degree murder and using a firearm to commit a felony.

III. ANALYSIS

With that background, we direct our attention to each of Dean's assignments of error, reciting additional facts as needed.

1. COLLATERAL ESTOPPEL

First degree murder, the crime with which Dean was charged, requires premeditation, Neb. Rev. Stat. § 28-303 (Reissue 1989); second degree murder, on the other hand, does not require premeditation, Neb. Rev. Stat. § 28-304 (Reissue 1989). The information alleged that Dean "did kill . . . HAYNES purposely and with deliberate and premeditated malice." Thus, with respect to the first assignment of error, Dean urges that the doctrine of collateral estoppel barred the State from relitigating the issue of Dean's premeditation by virtue of the separate trial in which it was found that Anderson aided and abetted Dean in the commission of second degree murder on a finding that "[a]lthough an intent to kill can be inferred from the actions of . . . Dean under all the circumstances, this court does not feel and does not find that premeditation can be inferred."

(a) Scope of Review

The applicability of the doctrine of collateral estoppel constitutes a question of law. *Kopecky v. National Farms, Inc.*, 244 Neb. 846, 510 N.W.2d 41 (1994). With regard to such a question, an appellate court is obligated to reach a conclusion independent from the lower court's conclusion. *Id.*

(b) Doctrine in Criminal Context

"Collateral estoppel" means that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties or their privies in any future lawsuit. *Ashe v. Swenson*, 397 U.S. 436, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970); *In re Estate of Wagner, ante* p. 625, 522 N.W.2d 159 (1994). Although first developed in civil litigation, collateral estoppel has become an established rule of federal criminal law since *United States v. Oppenheimer*, 242 U.S. 85, 37 S. Ct. 68, 61 L. Ed. 161 (1916).

This court has also recognized that collateral estoppel may apply in a criminal case. In *State v. Gerdes*, 233 Neb. 528, 446 N.W.2d 224 (1989), a case involving drunk driving, we noted that the doctrine may be applied when an identical issue was decided in a prior action, there was a judgment on the merits which was final, the party against whom the doctrine is to be applied is a party or is in privity with a party to the prior action,

and there was an opportunity to fully and fairly litigate in the prior litigation. We reasoned that the constitutional protection against double jeopardy afforded the doctrine of collateral estoppel to a criminal defendant. *Gerdes* explained that a criminal defendant, relying on collateral estoppel in relation to constitutional protection against double jeopardy in a present proceeding, has the burden to prove that the particular issue which is sought to be relitigated, but which is constitutionally foreclosed by the Double Jeopardy Clause, was necessarily or actually determined in a previously concluded criminal proceeding. See, also, *State v. Long*, 206 Neb. 446, 293 N.W.2d 391 (1980); *State v. Carter*, 205 Neb. 407, 288 N.W.2d 35 (1980).

Citing *State v. Gonzalez*, 75 N.J. 181, 380 A.2d 1128 (1977), Dean argues that in addition to double jeopardy concerns, both federal and state due process requirements make collateral estoppel applicable to his case. After the defendant in *Gonzalez* was indicted, a coindictee's motion to suppress certain evidence was sustained; however, the defendant's similar motion was later overruled. While the New Jersey Supreme Court recognized that collateral estoppel in criminal prosecutions involves different considerations than are involved in civil litigation, it nonetheless ruled that the evidence was to be suppressed in the defendant's case. In so ruling, it wrote:

> Where a defendant makes a convincing showing that he was unable to participate at a prior suppression hearing in which the challenged search was invalidated . . . and the evidence adduced at both hearings is substantially the same, he should be afforded the right to claim the benefits of such a hearing.

Id. at 196, 380 A.2d at 1136.

It should be noted, however, that earlier, in *State v. Hubbard*, 123 N.J. Super. 345, 303 A.2d 87 (1973), the New Jersey Supreme Court ruled the fact that in a previous, separate trial an accomplice was found guilty of second degree murder did not mean that Hubbard could not be found guilty of felony murder, robbery, and armed robbery. Hubbard then sought federal habeas corpus relief, contending that the federal Constitution required the application of collateral estoppel so

as to preclude his prosecution for felony murder or the underlying felonies because the first jury must have found there had been no robbery. The contention was rejected by the U.S. Court of Appeals for the Third Circuit in *United States ex rel. Hubbard v. Hatrak*, 588 F.2d 414 (3d Cir. 1978), *cert. denied* 440 U.S. 974, 99 S. Ct. 1541, 59 L. Ed. 2d 792 (1979), which held that the federal Due Process Clause did not impose a collateral estoppel requirement in favor of a criminal defendant who was not a party to the first case.

Noting that in *Gonzalez* the New Jersey Supreme Court carved out a narrow suppression motion exception to the general rule that one seeking to apply collateral estoppel must have been a party to the first proceeding, the Third Circuit advanced several reasons nonmutual collateral estoppel should not apply in a criminal case. Among them is the adverse effect on law enforcement when the state is deprived of the use of evidence which might produce a different outcome in the later proceeding. Furthermore, the extension of collateral estoppel to nonparties may inhibit the grant of criminal defendants' severance motions. The Third Circuit noted that it would be unfortunate if, in the pursuit of fairness with respect to one aspect of the criminal justice process, one were to cause untoward consequences in another. Therefore, the Third Circuit concluded that whatever may be said in favor of the application of collateral estoppel when the criminal defendant is a party to the judgment, the case in favor of such application in favor of nonparties is much less compelling.

Dean also cites *Blonder-Tongue v. University Foundation*, 402 U.S. 313, 91 S. Ct. 1434, 28 L. Ed. 2d 788 (1971), and *United States v. Bruno*, 333 F. Supp. 570 (E.D. Pa. 1971). However, these cases hold that mutuality of estoppel is not a due process requirement, but that the interest of a judicial system in avoiding relitigation is nonetheless a sufficient reason for applying the doctrine of collateral estoppel in favor of a nonparty. *United States ex rel. Hubbard v. Hatrak, supra.*

Dean fails to cite any authority supporting his contention that collateral estoppel is required by the federal Constitution. Indeed, in *Standefer v. United States*, 447 U.S. 10, 100 S. Ct. 1999, 64 L. Ed. 2d 689 (1980), the Court held that despite the

prior acquittal of an Internal Revenue Service agent accused of perpetrating an offense, the government was not barred under the doctrine of nonmutual collateral estoppel from relitigating the issue of whether another agent had aided and abetted the first agent. The Court remarked that the application of nonmutual collateral estoppel in criminal cases is complicated by the rules of evidence and exclusions unique to criminal law. It reasoned that criminal cases involve competing policy considerations which outweigh the economy concerns that undergird the estoppel doctrine. The Court noted that its decision did no more than manifest the "simple, if discomforting, reality that 'different juries may reach different results under any criminal statute. . . .' " *Id.*, 447 U.S. at 25.

Not only do we not find, nor have we been cited to, any authority for the proposition that nonmutual collateral estoppel is afforded a nonparty criminal defendant by the Nebraska Constitution, many state courts have rejected the suggestion that such should be the rule. See, *Com. v. Lewis*, 306 Pa. Super. 81, 452 A.2d 13 (1982) (acquittal of person charged with receiving bribes from defendant charged with corrupt organizations, commercial bribery, and breach of duty to act did not require dismissal of charges); *Commonwealth v. Benson*, 389 Mass. 473, 451 N.E.2d 118 (1983), *cert. denied* 464 U.S. 915, 104 S. Ct. 278, 78 L. Ed. 2d 257 (collateral estoppel only applies in criminal cases where there is mutuality of parties); *State v. Littleton*, 436 So. 2d 500 (La. 1983) (collateral estoppel did not bar state from bringing defendant to trial on charges of conspiracy to commit murder even though state prevented from bringing conspiracy charges against alleged coconspirator); *State v. Jimenez*, 130 Ariz. 138, 634 P.2d 950 (Ariz. 1981) (prosecution of defendant for murder not barred by fact accomplice had been acquitted of murder in separate trial); *State v. Swearingin*, 564 S.W.2d 351 (Mo. App. 1978) (collateral estoppel did not apply to criminal prosecution of defendant on theory certain aspects of separate proceedings against codefendant affected case against defendant); *Timms v. Cupp*, 38 Or. App. 339, 590 P.2d 264 (1979), *review denied* 286 Or. 637 (collateral estoppel cannot be asserted by person other than defendant in original prosecution); *Larsen v. State*, 93

Nev. 397, 566 P.2d 413 (1977) (fact that jury in previous trial found codefendant guilty of first degree kidnapping did not preclude defendant from being convicted of felony murder pursuant to doctrines of res judicata and collateral estoppel); *Woodford v. Municipal Court*, 37 Cal. App. 3d 874, 112 Cal. Rptr. 773 (1974) (prosecution of petitioners with regard to their showing of allegedly obscene film not collaterally estopped due to fact another person had been acquitted in obscenity prosecution pertaining to same film in which scienter was admitted); *State v. Mondrosch*, 108 N.J. Super. 1, 259 A.2d 725 (1969), *cert. denied* 55 N.J. 600, 264 A.2d 71 (1970) (judgment of acquittal against one defendant does not operate as res judicata or collateral estoppel to prosecution of another, although same transaction involved).

(c) Resolution

Accordingly, the first assignment of error must be resolved against Dean.

2. Suppression Motion

In the second assignment of error, Dean urges that because Sorensen interviewed him outside the presence of his court-appointed attorney, the trial court erred in refusing to suppress his inculpatory statements.

(a) Scope of Review

We begin by recalling that in determining the correctness of a trial court's ruling on a motion to suppress, an appellate court will uphold the trial court's findings of fact unless those findings are clearly erroneous. *State v. Dyer*, 245 Neb. 385, 513 N.W.2d 316 (1994); *State v. Flores*, 245 Neb. 179, 512 N.W.2d 128 (1994). The appellate court will not reweigh or resolve conflicts in the evidence. *State v. Ranson*, 245 Neb. 71, 511 N.W.2d 97 (1994).

(b) Nature of Right to Counsel

The Fifth Amendment to the U.S. Constitution includes the right to be assisted by counsel during custodial interrogation. *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). The Sixth Amendment gives one accused of a crime the right to the assistance of counsel. *Gideon v. Wainwright*,

372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963). In addition, Neb. Const. art. I, § 11, provides that in all criminal prosecutions, an accused shall have the right to appear and defend in person or by counsel. However, we neither find nor have we had our attention called to any authority holding that the Nebraska Constitution grants a broader right to counsel which requires a more rigorous waiver than that necessary to waive the right to counsel under federal constitutional provisions. Therefore, a waiver of counsel which is effective under the federal Constitution is sufficient to waive the right to counsel under our state Constitution.

The *Miranda* Court determined that the Fifth Amendment's prohibition against compelled self-incrimination required that custodial interrogation be preceded by advice to the putative defendant of the right to remain silent and also the right to the presence of an attorney. But an accused may waive those rights provided the waiver is made voluntarily, knowingly, and intelligently. *Moran v. Burbine*, 475 U.S. 412, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986).

It has been held that an effective waiver of an accused's Fifth Amendment right to counsel has two distinct dimensions. First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. *Moran v. Burbine, supra*. Voluntariness of an admission or confession is determined by the totality of the circumstances. *State v. Martin*, 243 Neb. 368, 500 N.W.2d 512 (1993); *State v. Bronson*, 242 Neb. 931, 496 N.W.2d 882 (1993); *State v. Phelps*, 241 Neb. 707, 490 N.W.2d 676 (1992). Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. *Moran v. Burbine, supra*. Only if the totality of the circumstances surrounding the interrogation reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the accused has waived the Fifth Amendment right to counsel. *Id.*

A waiver of the Sixth Amendment right to counsel is valid only when it reflects an intentional relinquishment or abandonment of a known right or privilege. *Johnson v. Zerbst*,

304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938). Therefore, the key inquiry is whether one who waived the Sixth Amendment right was sufficiently aware of the right to have counsel present during questioning and of the possible consequences of a decision to forgo the aid of counsel. *Patterson v. Illinois*, 487 U.S. 285, 108 S. Ct. 2389, 101 L. Ed. 2d 261 (1988).

After being told by the police that he had been indicted for murder, the petitioner in *Patterson* twice indicated his willingness to discuss the crime during interviews initiated by the authorities. On both occasions, the petitioner was read a form waiving his *Miranda* rights, which he signed. He then made inculpatory statements and later contended that his Sixth Amendment rights were violated because he did not knowingly and intelligently waive his right to have counsel present during his postindictment questioning. The U.S. Supreme Court acknowledged that the petitioner's Sixth Amendment right to counsel came into existence with his indictment and acknowledged as well that the policies behind the Fifth and Sixth Amendment rights to counsel differ. However, it rejected the notion that one right is superior to or greater than the other, or that it is more difficult to waive the Sixth Amendment right than it is to waive the Fifth Amendment right.

Indeed, it observed that there is no substantial difference between the usefulness of a lawyer during custodial interrogation and during postindictment questioning. Although there was no doubt that the petitioner had the right to the assistance of counsel at his interviews with the authorities, and had he indicated that he wanted counsel's assistance, questioning would have had to stop, the *Miranda* warnings he received adequately informed him of his Sixth Amendment right to have counsel present while being interviewed. The *Patterson* Court thus concluded that the petitioner's postindictment questioning did not violate that right.

(c) Trial Court's Findings

Here, the evidence is such that the trial court could reasonably find that Dean initiated the interview with Sorensen, Sorensen gave Dean the *Miranda* warnings, Dean

understood them, and Dean desired to talk with Sorensen outside the presence of his attorney. There being no evidence of coercion or force by the authorities in an effort to obtain a statement from Dean, under the totality of the circumstances, it cannot be said that the trial court's finding that Dean made a voluntary, knowing, and intelligent waiver of his Fifth and Sixth Amendment rights to counsel is clearly erroneous.

(d) Resolution

Thus, the second assignment of error must also be resolved against Dean.

3. Receipt of Evidence

The third assignment of error rests on Dean's claim that the trial court should not have admitted in evidence the State's laser trajectory analysis of the fatal bullet's path because the State failed to establish that such analysis is generally accepted in the relevant scientific community as scientifically valid.

(a) Scope of Review

The admission of expert testimony is ordinarily within the discretion of the trial court, and its ruling will be upheld in the absence of an abuse of discretion. *State v. Borchardt*, 224 Neb. 47, 395 N.W.2d 551 (1986).

(b) Novel Scientific Evidence

Neb. Evid. R. 702, Neb. Rev. Stat. § 27-702 (Reissue 1989), provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

When the proffered opinion evidence relates to a topic which has been judicially recognized as a proper subject for expert testimony, the court need only consider whether this evidence will aid the jury in deciding the particular issues in the case. 3 Jack B. Weinstein & Margaret A. Berger, Weinstein's Evidence ¶ 702[03] (1994). However, when a court is faced with an offer of a novel form of expertise which has not yet received judicial sanction, an initial inquiry is in order: Is this new technique or principle sufficiently reliable so that it will aid the jury in

reaching accurate results?

In accordance with *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), we have held that the admissibility of an expert's testimony, including an opinion, which is based on a scientific principle or is based on a technique or process which utilizes or applies a scientific principle, depends on general acceptance of the principle, technique, or process in the relevant scientific community. *State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (1990). Recently, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, ____ U.S. ____, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), the U.S. Supreme Court, under the provisions of Fed. R. Evid. 702, announced an arguably more flexible "reliability standard" for the admission of scientific expert evidence. However, notwithstanding that our rule 702 parallels the federal rule 702, *Daubert* does not apply to state court decisions. The increasing prevalence of expert evidence cautions against the admission of scientific evidence which is still the subject of dispute and controversy in the relevant scientific communities. See, also, *State v. Cauthron*, 120 Wash. 2d 879, 846 P.2d 502 (1993); *Fishback v. People*, 851 P.2d 884 (Colo. 1993); *State v. Vandebogart (DNA)*, 136 N.H. 365, 616 A.2d 483 (1992). We thus adhere to the *Frye* standard, under which the proponent of the evidence must prove general acceptance by surveying scientific publications, judicial decisions, or practical applications, or by presenting testimony from scientists as to the attitudes of their fellow scientists. See, *State v. Houser*, 241 Neb. 525, 490 N.W.2d 168 (1992); 1 McCormick on Evidence § 203 (John W. Strong 4th ed. 1992). Moreover, evidence of a test result cannot be characterized as "scientific" or qualify as "technical or other specialized knowledge," and thus within the purview of § 27-702, unless and until it is established that the test result demonstrates what it is claimed to demonstrate. *State v. Borchardt, supra.*

Dean argues that laser trajectory is novel scientific evidence which required the State to establish that the underlying scientific principle or technique was generally accepted within the relevant scientific community before such evidence was admissible. He further contends that the State failed to provide sufficient evidence concerning the general acceptance of such a

technique. Therefore, Dean urges that the testimony regarding the firearms examiner's use of the laser beam at the crime scene was inadmissible because the foundation for its receipt was lacking.

However, various trial courts have readily admitted crime scene reconstruction evidence that included the insertion of dowels, rods, or strings through bullet holes to demonstrate a bullet's path. See, *Vasquez v. Hernandez*, No. 91 C 4088, 1994 WL 201092 (N.D. Ill. May 18, 1994) (memorandum opinion) (laser trajectory system used to determine where bullets originated); *Sizemore v. State*, 251 Ga. 867, 310 S.E.2d 227 (1984) (officer testified he positioned string through bullet holes to demonstrate bullet's path); *Pruitt v. State*, 232 Ala. 421, 168 So. 149 (1936) (no error in allowing witness to testify he placed a pencil in bullet hole to see direction it entered); *State v. Dunn*, 824 S.W.2d 533 (Mo. App. 1992) (defendant's lawyer testified he checked state's theory of bullet trajectory by attaching string between bullet holes); *Quinlivan v. State*, 627 So. 2d 1082 (Ala. Crim. App. 1992) (investigator testified he ran string through bullet holes demonstrating bullet's path); *People v. Ross*, 201 Cal. App. 3d 1232, 247 Cal. Rptr. 827 (1988) (police officer permitted to testify he used laser to reconstruct path of bullets to determine gunman's location); *Smith v. State*, 466 So. 2d 1026 (Ala. Crim. App. 1985) (officer testified he attached string between bullet hole and bullet ricochet mark); *Ivey v. State*, 369 So. 2d 1276 (Ala. Crim. App. 1979) (permitted use of life-size mannequin with steel rod positioned to demonstrate bullet's path through entrance and exit wound was not abuse of discretion); *Cherry v. State*, 488 S.W.2d 744 (Tex. Crim. App. 1972), *cert. denied* 411 U.S. 909, 93 S. Ct. 1538, 36 L. Ed. 2d 199 (1973) (officer testified he and another officer inserted pencils through bullet holes to determine angle, then attached strings to pencils between bullet holes to demonstrate trajectories of bullets).

Nebraska is no exception. In *State v. Thompson*, 244 Neb. 375, 507 N.W.2d 253 (1993), the trial court admitted evidence concerning the reconstruction by police of the paths taken by bullets, which included the placing of rods through bullet holes to determine the angle from which the bullets were fired.

The firearms examiner testified that the use of lasers to reconstruct bullet trajectories is accepted among firearms examiners. The record demonstrates that the fact a laser beam travels in a straight line is common knowledge. Therefore, aiming a laser beam through bullet holes to reconstruct a bullet's path is no less reliable than inserting a dowel into a bullet hole to demonstrate its path. In short, laser trajectory analysis is not the type of novel scientific evidence that lacks judicial sanction because of questionable reliability or validity such as is the case with polygraphs, horizontal nystagmus tests, hypnosis to refresh a witness' recollection, or certain aspects of deoxyribonucleic acid profiling. See, *State v. Houser*, 241 Neb. 525, 490 N.W.2d 168 (1992); *State v. Borchardt*, 224 Neb. 47, 395 N.W.2d 551 (1986); *State v. Palmer*, 210 Neb. 206, 313 N.W.2d 648 (1981), *cert. denied* 484 U.S. 872, 108 S. Ct. 206, 98 L. Ed. 2d 157 (1987); *Boeche v. State*, 151 Neb. 368, 37 N.W.2d 593 (1949).

(c) Resolution

Therefore, the third assignment of error, too, must be resolved against Dean.

4. Malice Element

The fourth assignment of error rests on the fact that the trial court, in acquiescing to Dean's request that it make specific findings, failed to specifically state that it found Dean to have acted with malice.

Malice is an essential element of murder in the second degree. *State v. Martin, post* p. 896, 524 N.W.2d 58 (1994); *State v. Manzer, ante* p. 536, 519 N.W.2d 558 (1994). The finding in question states only that the "killing of the decedent was intentionally done in that it was done willfully or purposely and not accidentally or involuntarily."

(a) Scope of Review

Whether malice existed is unquestionably a factual issue. See *State v. Jones*, 245 Neb. 821, 515 N.W.2d 654 (1994) (jury instruction failing to include malice as element of second degree murder prejudicially erroneous). However, whether a finding is sufficient to support a judgment is a question of law. See

Cochran v. Cochran, 62 Neb. 450, 87 N.W. 152 (1901) (if fraudulent intent inferable from facts, judgment will not be reversed because trial court failed to state in finding that such intent existed).

(b) Sufficiency of Finding

Like intent, malice concerns the killer's state of mind and may thus be inferred from the words and acts of the defendant, the circumstances surrounding his or her conduct, and the evidence relating to the circumstances of the criminal act. *State v. Thompson, supra*. Malice is that condition of the mind which is manifested by the intentional doing of a wrongful act without just cause or excuse. *Id.*

The evidence is that Dean meant to and did fire a high-powered rifle into the lighted portion of a trailer at a time when an automobile was parked nearby. Thus, the direct evidence is that Dean fired the rifle "intentionally," as expressly required by § 28-304, and it can be inferred from the surrounding circumstances that he did so with malice, for he intentionally did a wrongful act. That is, he pointed and shot into an area where he could reasonably have expected someone to be, without cause or excuse for doing so. See *State v. Bachkora*, 229 Neb. 421, 427 N.W.2d 71 (1988) (pointing gun at another unlawful for purpose of manslaughter statute). Accord *Ford v. State*, 71 Neb. 246, 98 N.W. 807 (1904).

That the trial court did not expressly state it found the existence of malice does not require a reversal of its judgment. In *Cochran v. Cochran, supra*, the trial court entered a decree directing the sale of certain land for the payment of alimony. The decree was attacked on the basis that it did not find that the purchaser had acquired the land with knowledge of the seller's fraudulent intent. This court stated, however, that while the words "fraudulent intent" did not appear in the finding, the facts were such that fraudulent intent must have existed, and held that the decree was justified.

Although *Cochran* is a civil case, the reasoning is equally applicable to a criminal case. It serves no purpose to reverse a conviction because a trial court acting as the trier of fact neglected to specifically mention the requisite mental state

where the evidence establishes the existence of the mental state and the other findings are sufficient to imply its presence.

For example, in *People v Rushlow*, 179 Mich. App. 172, 445 N.W.2d 222 (1989), the lower court in a bench trial rejected the defendant's theory of accident or self-defense, found that the victim died of stab wounds at the hands of the defendant, and found that there was no justification or excuse for the killing. Although the lower court did not make a specific finding on the issue of malice, it concluded that the elements of second degree murder had been established beyond a reasonable doubt and so adjudged the defendant. Under those circumstances, the appellate court concluded that the totality of the findings was sufficient to support the conviction.

In charging the defendant with aggravated assault, the prosecution in *De Leon v. State*, 865 S.W.2d 139 (Tex. App. 1993), alleged that he had used a knife capable of causing serious bodily injury. In affirming, notwithstanding the lower court's failure to expressly find that the defendant had used a deadly weapon, the reviewing court reasoned that such finding was implied in the finding that the defendant was guilty as charged.

Likewise, the reviewing court, in *People v. Gutierrez*, 105 Ill. App. 3d 1059, 433 N.E.2d 361 (1982), concluded the mere fact that the lower court failed to mention until sentencing that the defendant had knowledge of the accident did not indicate the defendant had been found guilty of leaving the scene without consideration of the state of his knowledge.

(c) Resolution

The fourth assignment of error is therefore resolved against Dean as well.

5. Sufficiency of Evidence

In the fifth and last assignment of error, Dean asserts the evidence was, in any event, insufficient to sustain the trial court's judgment. He urges that when a criminal prosecution is premised on circumstantial evidence, any fact or circumstance susceptible of two interpretations must be resolved in favor of the accused. He claims that only circumstantial evidence exists to support a finding of an intentional killing, whereas there was

direct countervailing evidence in the form of testimony from a participant-witness that the gunmen did not intend to kill anyone.

(a) Scope of Review

A conviction in a bench trial of a criminal case must be sustained on appeal if the evidence, viewed and construed in the light most favorable to the State, is legally sufficient to support that conviction. *State v. Winchester*, 239 Neb. 535, 476 N.W.2d 862 (1991).

In determining whether evidence is sufficient to sustain a conviction in a bench trial, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or reweigh the evidence. *State v. Russell*, 243 Neb. 106, 497 N.W.2d 393 (1993).

(b) Nature of Evidence

It is true that where only circumstantial evidence exists to support a conviction and the evidence is reasonably susceptible of two interpretations, one of guilt and the other of nonguilt and neither inference is stronger, for the purpose of determining whether the State has made a prima facie case, and for that purpose only, the inferences are to be viewed most favorably to the accused. See, *State v. Mowry*, 245 Neb. 213, 512 N.W.2d 140 (1994); *State v. Covarrubias*, 244 Neb. 366, 507 N.W.2d 248 (1993). See, also, *State v. Sexton*, 240 Neb. 466, 482 N.W.2d 567 (1992); *State v. LaFreniere*, 240 Neb. 258, 481 N.W.2d 412 (1992).

But this is not such a case, for here not only was there evidence of Dean's admission that he intentionally shot into the trailer, two witnesses testified that they had reason to suspect that someone was in the trailer at the time of the shooting. Williams testified that he thought he saw someone in the window of the trailer and said so, but was unsure whether anyone heard him. Pool, one of the gunmen, testified that he saw someone peek out the front window before he and other participants parked their automobile and handed out the guns. Such testimony is direct evidence that someone was inside the trailer. *State v. Sexton, supra* (direct evidence is proof of facts

by witnesses who saw acts done or heard words spoken).

Indeed, we declare here and now that evidence that one, intentionally and with malice, shot into a residence, lighted or unlighted, and that a death resulted is, in and of itself, sufficient to establish murder in the second degree.

(c) Resolution

Thus, as were the preceding assignments of error, the fifth and final assignment is resolved against Dean.

IV. JUDGMENT

Inasmuch as the record fails to sustain any of Dean's assignments of error, the trial court's judgment is, as first stated in part I, affirmed.

AFFIRMED.

WRIGHT, J., concurring in part, and in part dissenting.

I concur in the result. However, I continue to disagree with the majority's determination that malice is an essential element of second degree murder. See *State v. Grimes, ante* p. 473, 519 N.W.2d 507 (1994) (Wright, J., dissenting).

STATE OF NEBRASKA, APPELLEE, V. MARK E. PACKETT, APPELLANT.
523 N.W.2d 695

Filed November 18, 1994. No. S-93-971.

1. **Statutes.** Relief under Neb. Rev. Stat. § 39-669.19 (Cum. Supp. 1992) is discretionary.
2. **Statutes: Words and Phrases.** The word "may" in a statute means that discretionary action is available.

Appeal from the District Court for Sarpy County, RONALD E. REAGAN, Judge, on appeal thereto from the County Court for Sarpy County, JEFFREY L. CAMPBELL, Judge. Judgment of District Court affirmed.

Michael T. Levy for appellant.

Don Stenberg, Attorney General, and David T. Bydalek for appellee.

HASTINGS, C.J., WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ., and BOSLAUGH, J., Retired.

BOSLAUGH, J., Retired.

The defendant, Mark E. Packett, pleaded guilty to a charge of driving while intoxicated, third offense, and was sentenced to jail, was fined, and had his driving privileges revoked for 15 years. On June 30, 1993, his application for a reduction of the period of suspension, filed June 17, was heard by the county court.

The application alleged that the defendant had been convicted on September 5, 1986; that more than 5 years had elapsed since the date of the revocation; that the defendant had completed a program for treatment of chemical dependency and was recovering or had substantially recovered from the dependency on or tendency to abuse alcohol or drugs; and that he satisfied the other requirements of Neb. Rev. Stat. § 39-669.19 (Cum. Supp. 1992). The county court denied the application and found that the defendant had failed to show by a preponderance of the evidence the necessary elements in § 39-669.19.

Upon appeal to the district court, the judgment of the county court was affirmed. The defendant has now appealed to this court.

A letter from the district judge, a copy of which is in the transcript, recites that within 2 years of the date of revocation the defendant was convicted of driving under suspension and that in 1988 the defendant was sentenced to imprisonment and was subsequently paroled on August 25, 1989.

A copy of the certificate of parole was received in evidence. A condition of the parole is that the defendant "attend two A.A. meetings per week." The defendant admitted that he has not continued to attend AA meetings on the ground that such is unnecessary considering the recovery that he has made. The district court noted that there is no evidence that the parole has been terminated or that the condition of parole has been eliminated.

There is no documentary evidence that the defendant successfully completed a program for chemical dependency,

although he was "discharged satisfactory, but incomplete" from such a program, according to an institutional progress report dated March 10, 1989.

An institutional progress report dated July 24, 1989, contains an entry as follows: "Programs completed — none." The report also states that the defendant needs "AA structure based on history of alcohol abuse" and that "AA programming should be considered mandatory if granted the parole privilege."

At the hearing, testimony favorable to the defendant was received from the defendant and the chief of police of LaVista, the defendant's brother.

Section 39-669.19 does not grant an absolute right to a defendant to a reduction of a term of revocation, but provides that the period of revocation "may" be reduced if the provisions of the statute are shown by the applicant to be satisfied by a preponderance of the evidence. Neb. Rev. Stat. § 49-802(1) (Reissue 1993) provides that "[w]hen the word may appears, permissive or discretionary action is presumed. When the word shall appears, mandatory or ministerial action is presumed."

In view of the record in this case, the judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. CHARLES RAYMOND MCCORMICK ET AL., APPELLEES.

523 N.W.2d 697

Filed November 18, 1994. Nos. S-93-1065, S-93-1066, S-93-1067.

1. **Moot Question.** A case becomes moot when issues initially presented in litigation cease to exist or the litigants lack a legally cognizable interest in the outcome.

2. **Moot Question: Words and Phrases.** A moot case is one which seeks to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive.

Petition for further review from the Nebraska Court of Appeals, on appeal thereto from the District Court for Sarpy County, GEORGE A. THOMPSON, Judge. Appeal dismissed.

Michael D. Wellman, Sarpy County Attorney, for appellant.

Chris M. Arps for appellees McCormick and David Eugene Hall.

Carl I. Klekers for appellee Bryle Edward Radden.

HASTINGS, C.J., WHITE, CAPORALE, FAHRNBRUCH, and LANPHIER, JJ., and BOSLAUGH, J., Retired.

WHITE, J.

This case involves three codefendants, Charles Raymond McCormick, David Eugene Hall, and Bryle Edward Radden. On June 11, 1993, at a hearing on defendants' motions for new trial, the district court for Sarpy County ordered the State to disclose the name of a confidential informant the State used in the prosecution of the defendants. The State refused and timely appealed the district court's order to the Nebraska Court of Appeals. The Court of Appeals denied, without comment, the State's application by prosecutor for leave to docket error proceedings. This court granted the State's petition for further review.

On August 25, 1993, the district court denied the defendants' motions for new trial, and the defendants appealed. That appeal was the subject of *State v. McCormick and Hall, ante* p. 271, 518 N.W.2d 133 (1994) (*McCormick and Hall I*), and *State v. Radden, ante* p. 286, 518 N.W.2d 143 (1994) (*Radden I*), and will be discussed hereafter. The State alleges, in the appeal now before this court, that the district court abused its discretion in failing to acknowledge the State's privilege to withhold the identity of persons who furnish information to law enforcement agencies pursuant to Neb. Rev. Stat. § 27-510 (Reissue 1989). These cases are consolidated by order of the court, the records in the three cases being virtually identical.

The facts of these cases can be found in *McCormick and Hall I* and *Radden I* and will not be repeated here. The principal issue in *McCormick and Hall I* and *Radden I* was whether the district court erred in overruling the defendants' motions for new trial based on newly discovered evidence. The alleged newly discovered evidence that the defendants claimed warranted them a new trial was the name and criminal history of the confidential informant. This court held in *McCormick and Hall I* and *Radden I* that the district court correctly denied defendants' motions for new trial because (1) the name and criminal history of the confidential informant was not material enough to warrant a new trial and would not have changed the result of the trial, and (2) defense counsel failed to exercise reasonable diligence prior to the trial to discover and produce evidence that may have indicated that the confidential informant's evidence was inadmissible pursuant to Neb. Rev. Stat. § 29-2262.01 (Reissue 1989).

Section 29-2262.01 provides that an informant who is either in jail, on probation, or on parole cannot act as either an undercover agent or an employee of a law enforcement agency, and any evidence derived from an informant in violation of this section is inadmissible. The defendants were aware, prior to trial, that the confidential informant was on probation at the time he gave the information to the police and that the informant was not paid to do so. Defendants' knowledge of the confidential informant's name would not have made evidence derived from the informant any more likely to be excluded under § 29-2262.01, and thus we found that defendants were not entitled to a new trial. The defendants had the necessary information to challenge the admissibility of the informant's evidence prior to and during the trial, but failed to adequately do so. We also refused to entertain defendants' appeals of the judgments because those appeals were not timely filed. *McCormick and Hall I, supra.*

Our decisions in *McCormick and Hall I* and *Radden I* essentially make the issue in the case now before us moot. A case becomes moot when issues initially presented in litigation cease to exist or the litigants lack a legally cognizable interest in the outcome. *Duggan v. Beermann*, 245 Neb. 907, 515 N.W.2d

788 (1994); *Maack v. School Dist. of Lincoln*, 241 Neb. 847, 491 N.W.2d 341 (1992). A moot case is one which seeks to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive. *Employers Reins. Corp. v. Santee Pub. Sch. Dist. No. C-5*, 231 Neb. 744, 438 N.W.2d 124 (1989); *Mullendore v. School Dist. No. 1*, 223 Neb. 28, 388 N.W.2d 93 (1986).

Since this court decided in *McCormick and Hall I* and *Radden I* that (1) the identity of the confidential informant would not entitle the defendants to a new trial; (2) the defendants failed to timely appeal the judgments; and (3) the defendants cannot now show a legally cognizable interest in the outcome of this appeal, the issue the State now appeals is moot.

This court does not render advisory opinions, but decides cases and controversies. *Thomas v. Thomas*, 235 Neb. 129, 453 N.W.2d 752 (1990). It is not within the province of the Supreme Court to determine moot questions. *Torrey v. Torrey*, 207 Neb. 246, 298 N.W.2d 154 (1980). Having decided that the issue presented to this court on appeal is now moot, we shall not discuss its merits. The district court's order has become a nullity due to our decisions in *McCormick and Hall I* and *Radden I*.

APPEAL DISMISSED.

WRIGHT, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. DWIGHT WALTON, APPELLANT.
523 N.W.2d 699

Filed November 18, 1994. No. S-93-1127.

1. **Constitutional Law: Statutes: Standing.** To have standing to assert a claim of vagueness, a defendant must not have engaged in conduct which is clearly prohibited by the questioned statute and cannot maintain that the statute is vague when applied to the conduct of others.
2. **Convictions: Appeal and Error.** An appellate court will not set aside a finding of guilty in a criminal case where the finding is supported by relevant evidence, and only where the evidence lacks sufficient probative force as a matter of law may

the appellate court set aside a finding of guilty as unsupported by the evidence beyond a reasonable doubt.

Appeal from the District Court for Nance County: ROBERT R. STEINKE, Judge. Affirmed.

Thomas A. Wagoner and David T. Schroeder for appellant.

Don Stenberg, Attorney General, and Delores Coe-Barbee for appellee.

HASTINGS, C.J., WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ., and BOSLAUGH, J., Retired.

BOSLAUGH, J., Retired.

The defendant, Dwight Walton, was charged with and convicted of possession of a destructive device. He was sentenced to imprisonment for 20 months to 5 years. He was also charged with and convicted of two counts of misdemeanor theft by receiving stolen property. He has appealed but only from the felony of possession of a destructive device.

The record shows that the defendant and two other men were driving in and around the town of Fullerton, Nebraska, on the night of October 31, 1992. The three were carrying approximately six glass jars which they had filled with gasoline and fitted with cloth wicks. They lit and threw most of the jars at various sites in the area. They also placed stolen hay bales on a bridge and, using the gasoline from one of the jars as fuel, set them on fire. Later, they set a round hay bale on fire. They were stopped by a Nance County deputy sheriff shortly after setting the fires. Initially, the three men denied involvement in the fires. Later, one of the men, Charles Ziemba, confessed to starting the fires and implicated Walton.

Walton was charged with possession of a destructive device under Neb. Rev. Stat. § 28-1220(1) (Reissue 1989), a Class IV felony. At trial, the jury found him guilty.

Walton has appealed on the following grounds: (1) Neb. Rev. Stat. § 28-1213 (Reissue 1989), which defines the term "destructive device," is unconstitutional due to vagueness and improper delegation of legislative authority; (2) no evidence was adduced that showed that the jars were either designed to be used as weapons or that the primary purpose of the jars was

to be used as weapons; and (3) no evidence was adduced that showed that Walton intended the jars to be used as weapons.

Each assignment of error pertains to the specific language of § 28-1213, which provides in pertinent part:

> Destructive devices shall mean:
>
> (a) Any explosive, incendiary, or poison gas . . . (vii) Molotov cocktail, or any similar device, the primary or common purpose of which is to explode and to be used as a weapon against any person or property[.]
>
> . . . The term destructive device shall not include (i) any device which is neither designed nor redesigned for use as a weapon to be used against person or property . . . (iv) any other device which the Nebraska State Patrol finds is not likely to be used as a weapon or is an antique, or (v) any other device possessed under circumstances negating an intent that the device be used as a weapon against any person or property.

At trial, Walton argued that § 28-1213, which defines the term "destructive device," was unconstitutional due to vagueness and overbreadth. In his brief to this court, he argues that the vagueness stems from the legislative delegation of authority to the Nebraska State Patrol to define criminal behavior.

This argument must fail. To have standing to assert a claim of vagueness, a defendant must not have engaged in conduct which is clearly prohibited by the questioned statute and cannot maintain that the statute is vague when applied to the conduct of others. *State v. Connely*, 243 Neb. 319, 499 N.W.2d 65 (1993); *State v. Pierson*, 239 Neb. 350, 476 N.W.2d 544 (1991). The provision to which Walton objects does not apply to the facts of his case. The object for which Walton was convicted of possession was a Molotov cocktail, a weapon which the statute clearly listed as a destructive device. Because no vagueness exists in the statute as it applies to Walton's case, his argument that the statute is unconstitutional is rejected.

Walton claims that no evidence was adduced that showed that the jars were to be used as weapons. A deputy State Fire Marshal investigator stated that when the jars were filled with gasoline, they fit the definition of a Molotov cocktail. The

investigator also stated that a Molotov cocktail is "a makeshift incendiary bomb which is constructed of a breakable container filled with flammable liquid having a rag wick. The purpose is to do harm to individuals or damage to personal property." This testimony is sufficient to meet the standards required by the statute. This assignment of error is without merit.

Walton also claims that the evidence showed that he had not intended to use the jars as weapons, thereby rendering § 28-1220(1) inapplicable. As evidence that the jars were not to be used as weapons, Walton cites the testimony of Ziemba. Ziemba claimed that the jars were to be used as Halloween pranks rather than as weapons.

An appellate court will not set aside a finding of guilty in a criminal case where the finding is supported by relevant evidence, and only where the evidence lacks sufficient probative force as a matter of law may the appellate court set aside a finding of guilty as unsupported by the evidence beyond a reasonable doubt. *State v. Russell*, 243 Neb. 106, 497 N.W.2d 393 (1993). In this case, a jury, by considering the evidence of theft and vandalism, could have found that Walton intended to use the jars as weapons against property. The evidence of the State was sufficient to sustain the verdict.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RAMIRO MARTIN, ALSO KNOWN AS RAMIRO MARTINEZ-AMEZQUITA, APPELLANT.

524 N.W.2d 58

Filed November 18, 1994. No. S-94-104.

1. **Sentences: Appeal and Error.** A sentence of imprisonment that is within the statutory limits will not be disturbed on appeal in the absence of an abuse of discretion by the trial court.
2. **Criminal Law: Statutes: Time.** Generally, when an offense is committed prior to a statutory change, the amendment or new statute is not applicable to the defendant.

3. **Criminal Law: Constitutional Law: Sentences.** A change which imposes a more burdensome punishment than existed at the time a crime was committed runs afoul of ex post facto principles.
4. **Criminal Law: Sentences: Appeal and Error.** An indeterminate sentence imposed for a crime, where not authorized by statute, is erroneous but not void.
5. **Appeal and Error.** An appellate court reserves the right to note plain error which was not complained of at trial or on appeal but is plainly evident from the record, and which is of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process.
6. **Homicide: Intent.** Malice is a necessary element of murder in the second degree.

Appeal from the District Court for Madison County: RICHARD P. GARDEN, Judge. Reversed and remanded for further proceedings.

William F. Eustice, of Gallup & Schaefer, for appellant.

Don Stenberg, Attorney General, and J. Kirk Brown for appellee.

HASTINGS, C.J., WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ., and BOSLAUGH, J., Retired.

LANPHIER, J.

Francisco Jaiver Ponce Ledezma was murdered on October 31, 1990, in Madison County, Nebraska. Three years later, on October 27, 1993, appellant, Ramiro Martin, entered a plea of no contest to a charge of second degree murder for the killing of Ledezma. Subsequently, the district court for Madison County sentenced Martin to an indeterminate term of not less than 40 years nor more than life in prison. Apparently, this sentencing was pursuant to Neb. Rev. Stat. § 29-2204 (Supp. 1993), which became effective September 9, 1993. On appeal, Martin's sole assignment of error is that the district court erred in imposing his sentence. Martin asserts that the district court could not impose an indeterminate sentence under the law in effect on the date of the crime. Martin asserts that pursuant to Neb. Rev. Stat. §§ 28-105 and 28-304 (Reissue 1989), the district court could sentence him only to imprisonment for life or for a definite term of not less than 10 years. We agree. On October 31, 1990, the date of the murder, courts were not authorized to sentence one convicted of second degree murder to an indeterminate sentence. Therefore, the district court imposed

an invalid sentence upon Martin. However, because the third amended information, upon which Martin was arraigned and sentenced, failed to allege "malice" as a specific element of second degree murder, the judgment is reversed and the cause remanded for further proceedings pursuant to *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994), and *State v. Manzer, ante* p. 536, 519 N.W.2d 558 (1994).

BACKGROUND

On October 27, 1993, a third amended information was filed in the district court for Madison County, Nebraska. The information alleged that Martin, on or about October 31, 1990, intentionally caused the death of Ledezma, without premeditation.

On October 27, 1993, Martin entered a plea of no contest to the charge of murder in the second degree. Later, Martin attempted to withdraw his plea, claiming that he did not know the possible penalties for the charged offense.

On December 17, 1993, a hearing was held on the motion to withdraw. The district court denied Martin's motion to withdraw his plea after reviewing the record and the evidence presented during the December 17 hearing. The district court noted that Martin had been advised that the maximum penalty was life imprisonment and the minimum penalty was 10 years. The district court concluded that Martin had been fully advised as to the nature of the charge against him, the possible penalty, and the effect of his plea of no contest.

On December 20, the district court sentenced Martin to an indeterminate term of not less than 40 years nor more than life in prison. On December 27, Martin submitted a motion for reconsideration of his sentence. Martin asserted that the district court was not authorized to sentence one convicted of second degree murder to an indeterminate sentence. Citing §§ 28-105 and 28-304, Martin asserted that a district court could sentence him to life in prison or to a definite term of not less than 10 years. Martin's motion for reconsideration of his sentence was denied on January 21, 1994.

Martin filed a notice of appeal to the Nebraska Court of Appeals on January 14, 1994. We subsequently, under the

authority granted by Neb. Rev. Stat. § 24-1106(3) (Cum. Supp. 1992), removed the matter to this court in order to regulate the caseloads of the appellate courts.

ASSIGNMENT OF ERROR

Martin asserts that a court cannot sentence one convicted of second degree murder to an indeterminate sentence, but must sentence such a person to imprisonment either for life or for a definite term of not less than 10 years. See §§ 28-105 and 28-304. The State argues that § 29-2204 altered the rule against indeterminate sentencing for second degree murder. The effective date of § 29-2204 was September 9, 1993, almost 3 years after the occurrence of the crime of which Martin is accused.

STANDARD OF REVIEW

A sentence of imprisonment that is within the statutory limits will not be disturbed on appeal in the absence of an abuse of discretion by the trial court. *State v. Hoffman, ante* p. 265, 517 N.W.2d 618 (1994).

UNAUTHORIZED USE OF AN INDETERMINATE SENTENCE

Section 28-304(2) defines murder in the second degree as a Class IB felony. The penalty authorized by § 28-105 is a maximum of life imprisonment and a minimum of 10 years' imprisonment. On December 20, 1993, the district court sentenced Martin to an indeterminate term of not less than 40 years nor more than life in prison.

This court previously held that an indeterminate sentence could not be imposed on one convicted of second degree murder. See, *State v. Ward*, 226 Neb. 809, 415 N.W.2d 151 (1987); *State v. Moss*, 219 Neb. 327, 363 N.W.2d 367 (1985); *State v. Laravie*, 192 Neb. 625, 223 N.W.2d 435 (1974). However, in 1993, the Legislature enacted § 29-2204, which, effective September 9, 1993, specifically altered the rule against indeterminate sentencing for Class IB felonies.

Here, Martin entered a plea of no contest on October 27, 1993, to a crime that was committed on October 31, 1990. Apparently, the district court sentenced Martin pursuant to the

newly effective indeterminate sentencing statute, § 29-2204. Section 29-2204 (Supp. 1993) was not in effect on the date of the crime.

Generally, when an offense is committed prior to a statutory change, the amendment or new statute is not applicable to the defendant. *Berry v. Wolff*, 193 Neb. 717, 228 N.W.2d 885 (1975). A change which imposes a more burdensome punishment than existed at the time a crime was committed runs afoul of ex post facto principles. *Dobbert v. Florida*, 432 U.S. 282, 97 S. Ct. 2290, 53 L. Ed. 2d 344 (1977).

This indeterminate sentence is more burdensome. But more to the point, it simply was not authorized by statute. "An indeterminate sentence imposed for a crime, where not authorized by statute, is erroneous but not void." *State v. Rouse*, 206 Neb. 371, 381, 293 N.W.2d 83, 89 (1980). It is plain from the record before us that the district court lacked the authority to impose an indeterminate sentence on Martin.

ABSENCE OF MALICE

An appellate court reserves the right to note plain error which was not complained of at trial or on appeal but is plainly evident from the record, and which is of such a nature that to leave it uncorrected would result in damage to the integrity, reputation, or fairness of the judicial process. *State v. Dyer*, 245 Neb. 385, 513 N.W.2d 316 (1994); *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994).

Malice is a necessary element of murder in the second degree. *State v. Myers, supra*. Further, malice has been a necessary element of second degree murder for at least 10 years. See, *State v. Franklin*, 241 Neb. 579, 489 N.W.2d 552 (1992); *State v. Dean*, 237 Neb. 65, 464 N.W.2d 782 (1991); *State v. Rowe*, 214 Neb. 685, 335 N.W.2d 309 (1983). The element of malice must be alleged in the information upon which the defendant is arraigned and sentenced. See *State v. Manzer, ante* p. 536, 519 N.W.2d 558 (1994).

In this matter, the third amended information stated that Martin "on or about the 31st day of October, 1990, in Madison County, Nebraska, did intentionally cause the death of another person, namely Francisco Jaiver Ponce Ledezma, without

premeditation."

Under the rule of *State v. Myers, supra*, the failure to include malice as an element of second degree murder is plain error and is prejudicially erroneous.

CONCLUSION

Accordingly, the conviction and sentence are vacated and the cause remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WRIGHT, J., concurring in part, and in part dissenting.

I concur in the holding that the district court lacked authority to impose an indeterminate sentence on Martin. I continue to dissent from the holding that malice is an essential element of second degree murder. See *State v. Grimes, ante* p. 473, 519 N.W.2d 507 (1994) (Wright, J., dissenting).

STATE OF NEBRASKA EX REL. DON STENBERG, ATTORNEY GENERAL OF THE STATE OF NEBRASKA, RELATOR, V. DOUGLAS RACING CORP., A NEBRASKA NONPROFIT CORPORATION, RESPONDENT.

524 N.W.2d 61

Filed November 18, 1994. No. S-94-293.

1. **Constitutional Law: Gaming.** Neb. Const. art. III, § 24, provides that betting on the outcome of horseraces in Nebraska is authorized when conducted by the parimutuel method.
2. **Constitutional Law: Statutes: Proof.** The burden of establishing the unconstitutionality of a statute is on the one attacking its validity.
3. **Constitutional Law: Statutes: Presumptions.** Statutes are afforded the presumption of constitutionality, and the unconstitutionality of a statute must be clearly established before it will be declared void.
4. **Constitutional Law.** Constitutional provisions, like statutes, are not open to construction as a matter of course; construction of a constitutional provision is appropriate only when it has been demonstrated that the meaning of the provision is not clear and that construction is necessary.
5. **Gaming.** Telewagering at teleracing facilities is the functional equivalent of offtrack betting.

Original action. Judgment for relator.

Don Stenberg, Attorney General, and L. Jay Bartel for relator.

Robert A. Skochdopole and Raymond E. Walden, of Kennedy, Holland, DeLacy & Svoboda, for respondent.

HASTINGS, C.J., WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ., and BOSLAUGH, J., Retired.

PER CURIAM.

This is an original action on relation of the Attorney General seeking a declaration (1) that 1992 Neb. Laws, L.B. 718, now codified at Neb. Rev. Stat. §§ 2-1203, 2-1203.01, 2-1207, 2-1208, 2-1216, 2-1221, 2-1222, and 2-1230 through 2-1242 (Cum. Supp. 1994), violate Neb. Const. art. III, § 24, and (2) that a license issued to the respondent, Douglas Racing Corp., for a teleracing facility in Bennington, Nebraska, is void due to the unconstitutionality of the statute under which the license was issued. Also, relator seeks to permanently enjoin respondent from acting pursuant to the license issued for the Bennington teleracing facility. To simplify, the various sections of L.B. 718 discussed herein will be referred to by their current code section numbers.

The parties have stipulated to the facts. Neb. Const. art. III, § 24, forbids the Legislature to authorize games of chance, with certain exceptions. Section 24 provides in relevant part:

> (4) Nothing in this section shall be construed to prohibit (a) the enactment of laws providing for the licensing and regulation of wagering on the results of horseraces, wherever run, either within or outside of the state, by the parimutuel method, *when such wagering is conducted by licensees within a licensed racetrack enclosure* . . . .

(Emphasis supplied). It is the italicized language over which the dispute rises.

On April 14, 1992, the Nebraska Legislature passed L.B. 718 with an emergency clause over the Governor's veto. It took effect April 15. L.B. 718 authorized telewagering at teleracing facilities. Section 2-1231 states in part:

> (6) Teleracing facility shall mean a detached, licensed

area occupied solely by a licensee for the purpose of conducting telewagering and containing one or more betting terminals, which facility is either owned or under the exclusive control of the licensee during the period for which it is licensed; and

(7) Telewagering shall mean the placing of a wager through betting terminals electronically linked to a licensed racetrack, which electronic link instantaneously transmits the wagering information to the parimutuel pool for acceptance and issues tickets as evidence of such wager.

Basically, telewagering is the placing of a wager through terminals located at teleracing facilities. The teleracing facilities are located outside a licensed racetrack enclosure. The terminals are electronically linked to the racetrack's parimutuel betting pool. The wager is instantaneously transmitted to the parimutuel pool, and a ticket is issued to the bettor as evidence of a wager.

The State Racing Commission approves and issues licenses to racetracks to operate telewagering at teleracing facilities. § 2-1232. Sections 2-1237 and 2-1238 allow any racetrack to apply to the commission for approval of a teleracing facility. Respondent filed such an application with the commission on January 19, 1994; the application was approved. Respondent then opened a teleracing facility at Bennington, Nebraska, in March 1994 and continued to operate the facility as of the filing of the stipulation of facts. Relator applied to this court for leave to commence an original action, which we granted.

Betting on the outcome of horseraces in Nebraska is constitutionally authorized when conducted by the parimutuel method. Neb. Const. art. III, § 24. When betting by the parimutuel method, bettors attempt to predict the outcome of one or more races. In a particular race, all wagers predicting that a horse will win constitute a pool. From this pool, certain funds are deducted for taxes, for promotion of agriculture and breeder's awards, and for payment to the entity conducting the races. The remaining amount in the pool is paid out to the winning bettors proportionately. The amount which may be won is dependent upon a combination of the total amount bet

by all bettors and the total amount bet upon the same successful horse or combination of horses. There are also more complicated bets which involve prediction of the exact order of finish of the horses in a given race, or of the winners in two or more races. Money paid on each of these types of bets is assembled in a separate pool and divided among the successful bettors.

This parimutuel wagering system is managed at the racetrack with the aid of a computer known as a totalizator. The racetrack's totalizator receives information from various terminals concerning the amount and nature of bets placed upon each race or other pool. The totalizator continuously computes and recomputes the amount of each pool, the amount bet on each prediction for each horse, and the amount that would theoretically be paid out to successful bettors. This information is displayed as it is generated.

In Nebraska, prior to March 1994 when the teleracing facility at Bennington opened, a person who desired to place a bet on a horserace had to physically go to the racetrack; select the race, horse, and order of finish the bettor wished to predict; and then place a bet at a terminal station which was either operated by the bettor or a clerk at a parimutuel window. The money was taken at the terminal located within the licensed racetrack enclosure, and the bet was entered into the totalizator, which would record that transaction and place the money in the applicable parimutuel pool. The bettor then received a ticket as evidence of the wager. A successful bettor submitted the winning ticket to the racetrack for payment.

After March 1994, a person who desired to place a bet on a horserace could go either to the racetrack or to the teleracing facility in Bennington. The facility at Bennington contains terminals electronically linked to the racetrack's totalizator. Either the bettor or the parimutuel clerk operates the terminals and enters the bet. The bet is then sent to the totalizator at the racetrack, which enters the bet into the applicable parimutuel pool. The bettor receives a ticket as evidence of the wager.

The burden of establishing the unconstitutionality of a statute is on the one attacking its validity. *Kwik Shop v. City of Lincoln*, 243 Neb. 178, 498 N.W.2d 102 (1993). See, also, *State*

ex rel. Spire v. Strawberries, Inc., 239 Neb. 1, 473 N.W.2d 428 (1991). Statutes are afforded the presumption of constitutionality, and the unconstitutionality of a statute must be clearly established before it will be declared void. *Kwik Shop, supra*. See, also, *State v. Kipf*, 234 Neb. 227, 450 N.W.2d 397 (1990). Nebraska's Constitution is not a grant, but, rather, is a restriction on legislative power, and the Legislature is free to act on any subject not inhibited by the Constitution. *Jaksha v. Thomas*, 243 Neb. 794, 502 N.W.2d 826 (1993). See, also, *Lenstrom v. Thone*, 209 Neb. 783, 311 N.W.2d 884 (1981). Therefore, the telewagering statutes are presumed constitutional unless relator can clearly establish that they are not. We find that relator met this burden and that the aforementioned statutes, to the extent they authorize telewagering, are unconstitutional for the reasons set forth herein.

Both relator and respondent agree, and § 2-1231(6) so states, that the Bennington teleracing facility is a detached, licensed area in which telewagering is conducted, detached meaning not physically within the licensed racetrack enclosure. Relator argues that telewagering at a teleracing facility is unconstitutional because, although the Legislature can provide for the licensing and regulation of parimutuel wagering on horseraces, such wagering must be conducted within the licensed racetrack enclosure. Relator argues that telewagering is essentially offtrack betting and that offtrack betting is not constitutionally authorized. Respondent argues that this court should focus on the conduct of the licensee, not where the actual wagering occurs, and since the licensee is conducting his end of the wagering within the licensed racetrack enclosure, telewagering is constitutional. Respondent agrees that offtrack betting is not constitutionally authorized, but contends that telewagering is not offtrack betting.

Constitutional provisions, like statutes, are not open to construction as a matter of course; construction of a constitutional provision is appropriate only when it has been demonstrated that the meaning of the provision is not clear and that construction is necessary. *State ex rel. Spire v. Conway*, 238 Neb. 766, 472 N.W.2d 403 (1991). See, also, *In re*

Application A-16642, 236 Neb. 671, 463 N.W.2d 591 (1990); *State ex rel. Spire v. Beermann*, 235 Neb. 384, 455 N.W.2d 749 (1990). We find article III, § 24, unambiguous, and thus, no construction is necessary. The Constitution plainly states that parimutuel wagering is authorized as long as it is "conducted by licensees within a licensed racetrack." This provision plainly requires that (1) the wagering must be conducted by an entity licensed to do so and (2) the wagering must be conducted by licensees at a racetrack enclosure which is licensed to operate horseraces. See, e.g., *State, ex rel. Hunter, v. The Araho*, 137 Neb. 389, 289 N.W.2d 545 (1940) (holding that the bars are not thrown down on parimutuel horseracing in Nebraska). It follows then that wagering that occurs in a detached facility, one that is by definition outside a licensed racetrack enclosure, cannot logically occur within a licensed racetrack enclosure as required by our Constitution.

Courts must apply and enforce the Constitution as it is written. *Conway, supra*. See, also, *State ex rel. Meyer v. Steen*, 183 Neb. 297, 160 N.W.2d 164 (1968). As written, article III, § 24, requires that parimutuel betting be conducted within a licensed racetrack, and we must enforce it as such. We agree with relator that telewagering at teleracing facilities is the functional equivalent of offtrack betting. Since offtrack betting is betting not conducted within a licensed racetrack enclosure, it is unconstitutional, and telewagering is thus also unconstitutional.

An unconstitutional statute is a nullity, is void from its enactment, and is incapable of creating any rights or obligations. *State v. Cooley*, 156 Neb. 330, 56 N.W.2d 129 (1952). See, also, *State v. Bardsley*, 185 Neb. 629, 177 N.W.2d 599 (1970), *overruled on other grounds, State v. Rosenberger*, 187 Neb. 726, 193 N.W.2d 769 (1972); *Board of Educational Lands & Funds v. Gillett*, 158 Neb. 558, 64 N.W.2d 105 (1954). Accordingly, having declared all of the aforementioned statutes unconstitutional to the extent they authorize telewagering at teleracing facilities, we also declare that the license issued to Douglas Racing Corp. by the State Racing Commission for the operation of the Bennington facility is void, since Douglas Racing Corp. acted pursuant to an unconstitutional statute

when it licensed the track. Respondent is hereby enjoined from acting pursuant to the license issued by the commission.

JUDGMENT FOR RELATOR.

KENNETH L. THOMAS, APPELLANT, V. COUNTRYSIDE OF HASTINGS, INC., APPELLEE.
ELAINE R. THOMAS, APPELLANT, V. COUNTRYSIDE OF HASTINGS, INC., APPELLEE.
KENNETH L. THOMAS AND ELAINE R. THOMAS, APPELLANTS, V. COUNTRYSIDE OF HASTINGS, INC., APPELLEE.

524 N.W.2d 311

Filed December 2, 1994. Nos. S-92-647, S-92-648, S-92-649.

1. **Limitations of Actions.** The statute of limitations provided by Neb. Rev. Stat. § 25-224 (Reissue 1989) begins to run on the date on which the party holding the cause of action discovers, or in the exercise of reasonable diligence should have discovered, the existence of the injury or damage.
2. **Words and Phrases.** Discovery refers to the fact that one knows of the existence of an injury or damage and not that one knows who or what may have caused that injury or damage.
3. **Products Liability: Words and Phrases.** A product liability action is any action brought against a manufacturer, seller, or lessor of a product, regardless of the substantive legal theory or theories upon which the action is brought, for or on account of personal injury, death, or property damage caused by or resulting from the manufacture, construction, design, formulation, installation, preparation, or assembly of any product.
4. **Actions: Contracts: Torts: Pleadings.** Whether an action is characterized as one in tort or on contract is determined by the nature of the complaint, not by the form of the pleadings, and consideration must be given to the facts which constitute the cause of action.
5. **Contracts: Torts: Negligence.** One may sue in tort when there has been negligence in the performance of a contract.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, and IRWIN and MILLER-LERMAN, Judges, on appeal thereto from the District Court for Adams County, BERNARD SPRAGUE, Judge. Judgment of Court of Appeals reversed, and cause remanded.

John S. Mingus, of Mingus & Mingus, for appellants.

Roger G. Steele, of Luebs, Beltzer, Leininger, Smith & Busick, for appellee.

HASTINGS, C.J., WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ., and BOSLAUGH, J., Retired.

BOSLAUGH, J., Retired.

The plaintiffs, Kenneth L. and Elaine R. Thomas, brought these actions against the defendant, Countryside of Hastings, Inc., alleging the negligent installation of a furnace in their mobile home. The defendant alleged the plaintiffs' causes of action were barred by the statute of limitations in contracts for sale found in the Nebraska Uniform Commercial Code because the defendant sold the plaintiffs a mobile home with the installation of the furnace as an incidental part of the sale.

Following a trial solely on the issue of the statute of limitations, the trial court found that the plaintiffs' causes of action were barred by the statute of limitations found at Neb. U.C.C. § 2-725 (Reissue 1980). The plaintiffs appealed to the Nebraska Court of Appeals, which affirmed the trial court's judgment in *Thomas v. Countryside of Hastings*, 2 Neb. App. 590, 512 N.W.2d 660 (1994).

This court granted the plaintiffs' petition for further review.

On May 3, 1979, the plaintiffs entered into a written purchase agreement with the defendant to buy a double-wide mobile home. The purchase agreement included a provision that the mobile home would be delivered and set up on a basement foundation and that it would include such extras as a dishwasher, disposal, patio doors, and a septic tank, all of which would be installed. The agreement also provided that the defendant would install an upflow furnace in the basement. The total price of the contract was $37,589.85, and no separate amount was assigned to the furnace installation. The mobile home, as manufactured, included a closet downflow furnace.

The plaintiffs alleged in their petitions that when the defendant installed the upflow furnace, the venting pipe was not properly connected to a chimney or otherwise vented to the outside, but, instead, the venting pipe terminated between the ceiling of a closet and the roof sheeting. The plaintiffs also alleged that the negligence of the defendant "was not

discovered nor reasonably capable of being discovered by your plaintiff until the 4th day of January, 1985." The plaintiffs claim that as a result of the defendant's negligence in installing the furnace, their mobile home sustained damages from the improperly vented furnace, and they both sustained personal injuries from inhalation of carbon monoxide.

Section 2-725(1) provides that actions for breach of contract for sale must be commenced within 4 years after the cause of action accrues. Under § 2-725(2), the cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. Section 2-725(2) further provides that a breach of warranty occurs when tender of delivery is made.

The plaintiffs took delivery of their mobile home on December 20, 1979. They did not file their causes of action until January 3, 1986.

The Court of Appeals determined the plaintiffs' causes of action were based in contract and found that "but for the written agreement, Countryside had no obligation to properly install a furnace in the mobile home." *Thomas*, 2 Neb. App. at 595, 512 N.W.2d at 665. Since § 2-725 required the plaintiffs to file their causes of action for breach of contract within 4 years of tender of delivery of the plaintiffs' mobile home, the Court of Appeals found the plaintiffs' causes of action were barred by the statute of limitations.

Neb. Rev. Stat. § 25-224 (Reissue 1989) provides that product liability actions must be commenced within 4 years after the date on which the death, injury, or damage complained of occurs. This court has held that the statute of limitations provided by § 25-224 " 'begins to run on the date on which the party holding the cause of action discovers, or in the exercise of reasonable diligence should have discovered, the existence of the injury or damage.' " *Murphy v. Spelts-Schultz Lumber Co.*, 240 Neb. 275, 282, 481 N.W.2d 422, 428 (1992), quoting *Condon v. A. H. Robins Co.*, 217 Neb. 60, 349 N.W.2d 622 (1984). Discovery refers to the fact that one knows of the existence of an injury or damage and not that one knows who or what may have caused that injury or damage. See, *Ward v. City of Alliance*, 227 Neb. 306, 417 N.W.2d 327 (1988); *Condon,*

supra.

Neb. Rev. Stat. § 25-21,180 (Reissue 1989) defines a product liability action as

> any action brought against a manufacturer, *seller*, or lessor of a product, regardless of the substantive legal theory or theories upon which the action is brought, for or on account of personal injury, death, or property damage caused by or resulting from the manufacture, construction, design, formulation, *installation*, preparation, assembly . . . of any product . . . .

(Emphasis supplied.)

In this case, the plaintiffs filed their causes of action against the defendant, the seller of their mobile home, for the negligent installation of the furnace in their mobile home, which caused personal injury and property damage to the plaintiffs.

Whether an action is characterized as one in tort or on contract is determined by the nature of the complaint, not by the form of the pleadings, and consideration must be given to the facts which constitute the cause of action. *Lincoln Grain v. Coopers & Lybrand*, 216 Neb. 433, 345 N.W.2d 300 (1984). One may sue in tort when there has been negligence in the performance of a contract. *Id.*

> The injury in such a case results not from a breach of the contract but from negligence in the performance of it, for accompanying every contract is a common-law duty to perform with care, skill, reasonable expediency, and faithfulness the thing agreed to be done. A negligent failure to observe any of these conditions is a tort as well as a breach of contract.

Id. at 437, 345 N.W.2d at 305.

> Contract actions, which arise from a breach of a duty imposed on one by an agreement, protect a plaintiff's interest in or right to performance of another's promises, whereas tort actions, which arise from a breach of a duty imposed by law, protect a plaintiff's interest or right to be free from another's conduct which causes damage or loss to the plaintiff's person or property.

L. J. Vontz Constr. Co. v. State, 230 Neb. 377, 382-83, 432 N.W.2d 7, 11 (1988).

In the present case, the plaintiffs are not claiming the defendant installed their furnace in violation of any promises provided in the sales agreement or that the defendant breached any express or implied warranties in the contract. Instead, the plaintiffs are claiming that the defendant improperly installed their furnace and that they were injured and their property was damaged by that negligence. With or without the sales agreement, the defendant owed the plaintiffs the duty to properly install their furnace. Accordingly, the appropriate statute of limitations in this case is that found in § 25-224.

The evidence at the trial on the statute of limitations shows that the plaintiffs moved into the mobile home in December 1979. In December 1984, the plaintiffs had water running through the ceiling of the mobile home. On January 4, 1985, Kenneth Thomas climbed up on the roof to see what was causing the water to leak into the mobile home and discovered that there was no venting for the furnace system. There is no evidence regarding when the plaintiffs first began to suffer from inhaling the exhaust fumes from the improperly vented furnace.

Because a products liability action under § 25-224 begins to run on the date which the party possessing the cause of action discovers, or in the exercise of reasonable diligence should have discovered, the existence of the injury or damage, not the cause of such injury or damage, this cause must be remanded for further proceedings as to when the plaintiffs' personal injuries were discovered or in the exercise of reasonable diligence should have been discovered.

The judgment of the Court of Appeals affirming the trial court's judgment is reversed and the cause remanded to the Court of Appeals with direction that the cause be remanded to the district court for further proceedings.

REVERSED AND REMANDED.

RAYMOND E. RECORDS, M.D., APPELLEE AND CROSS-APPELLANT, V. GERALD CHRISTENSEN, M.D., APPELLANT AND CROSS-APPELLEE.

524 N.W.2d 757

Filed December 2, 1994. No. S-92-1118.

1. **Judgments: Appeal and Error.** In reviewing the district court's judgment for errors appearing on the record, an appellate court will not substitute the district court's factual findings where competent evidence supports those findings.
2. **Damages: Appeal and Error.** The amount of damages to be awarded is solely for the fact finder, and its action in this respect will not be disturbed on appeal if it is supported by the evidence and bears a reasonable relationship to the elements of the damages proved.
3. **Appeal and Error.** Errors assigned but not argued will not be addressed.
4. **Reformation: Intent.** A party's right to reformation of an agreement depends on whether the agreement reflects the parties' intent.
5. **Reformation: Fraud.** A court may reform an agreement when there has been either a mutual mistake or a unilateral mistake caused by fraud or inequitable conduct of the other party.
6. **Reformation: Presumptions: Intent: Evidence.** To overcome the presumption that the agreement correctly expresses the parties' intent and to obtain reformation, the party seeking reformation must offer clear, convincing, and satisfactory evidence.
7. **Evidence: Words and Phrases.** Clear and convincing evidence is evidence which produces in the trier of fact the firm belief or conviction about the existence of the fact to be proved.
8. **Reformation: Words and Phrases.** A mutual mistake is a belief shared by the parties, which is not in accord with the facts. A mutual mistake is one common to both parties in reference to the instrument to be reformed, each party laboring under the same misconception about their instrument.
9. **Prejudgment Interest.** To receive prejudgment interest, a litigant must comply with Neb. Rev. Stat. § 45-103.02 (Reissue 1993).
10. _____. Neb. Rev. Stat. § 45-104 (Reissue 1993) merely provides the interest rate on prejudgment interest in specific types of actions.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

E. Terry Sibbernsen, P.C., and Duane M. Katz for appellant.

Thomas A. Grennan and Francie C. Riedmann, of Gross & Welch, P.C., for appellee.

HASTINGS, C.J., WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ., and BOSLAUGH, J., Retired.

WHITE, J.

Gerald Christensen appeals from the judgment of the Douglas County District Court requiring him to pay Raymond Records $112,292.91 plus costs for breach of a fee-sharing arrangement; Records cross-appeals from the district court's order denying his motion to require Christensen to pay him prejudgment interest.

Records and Christensen are physicians and board-certified ophthalmologists and were employed by the University of Nebraska Medical Center (UNMC) when they entered into a fee-sharing arrangement in September 1986. The agreement is contained in a letter from Records to Christensen dated September 21, 1986, and agreed to by Christensen when he offered his signature. Records' letter, which constituted the fee-sharing arrangement, provided:

> This letter will serve to confirm our understanding with respect to our sharing the income from our practices. Practices in this context refer only to those activities regulated by the Nebraska Clinician's Group Medical Service Plan. The terms of our agreement are as follows:
>
> 1. The sharing of income ("Arrangement") will be on a 50 - 50 basis and shall commence as of September 1, 1986[.]
>
> 2. The arrangement shall be terminable by either of us on any July 1, by either of us giving thirty days [sic] notice to the other, that is by May 31, and further giving notice to the Professional Fees office of our desire to terminate the arrangement; otherwise, the Arrangement shall run July 1 to June 30 in each academic year in which it has not been terminated.
>
> 3. In the event that the Arrangement is terminated, we agree that accounts receivable collected during the six months following any termination date will be likewise shared equally; however, any production during that period shall be reserved to the producer. As to remaining accounts receivable remaining uncollected at the end of that six month period, we will instruct the Professional Fees office to distribute the avails of the collection to the producer.

4. In the event of our death or disability, we agree that notwithstanding the provisions of Paragraph 2, such death or disability shall be treated as a termination as of the date of death or disability and we will share in accordance with Paragraph 2.

5. Our actions under this letter and agreement shall not constitute us as joint venture [sic] or partners for any purposes.

The parties shared their fees in accordance with this agreement until January 1989.

In January 1989, Christensen instructed the service that manages professional fees to discontinue the 50-50 fee distribution. Records had taken a leave of absence from UNMC in November 1988 at the request of UNMC's dean and did not return to UNMC until March 15, 1989. Christensen testified that he, therefore, in January 1989, had instructed the Professional Fees Office to discontinue the fee-sharing agreement primarily because he "felt that Dr. Records had basically abrogated the contract." Christensen, however, failed to notify Records of the agreement's termination. Christensen testified:

Q. Did you attempt to send Mr. Records — or excuse me, Dr. Records, a letter at his home address?

A. No, I did not.

Q. Did you try and phone him at his home?

A. No, I did not.

Q. Did you make any attempt to send a certified letter or anything like that to that address?

A. No, I did not.

Q. And so from that period of time of December of '88, January of '89, until sometime until June of '89, did you ever make any attempt whatsoever to — to inform Dr. Records that it was your intent to terminate the agreement?

A. Well, I did see Dr. Records sometime later on in the year. I think he came back to the office in perhaps about April.

Q. Of '89?

A. And we never discussed the matter that I recall.

The district court found that Christensen had failed to give notice as required by the agreement and ordered Christensen to pay Records $112,292.91 plus costs. Christensen appealed to the Nebraska Court of Appeals. We removed this case from the Court of Appeals pursuant to our authority to regulate the caseloads of the appellate courts.

Christensen assigns three errors in his appeal. He contends that the district court erred in (1) failing to find and hold that Records' absence from his normal duties constituted a material breach of the agreement, (2) finding and holding that there was no mutual mistake between the parties sufficient to support a reformation of the agreement, and (3) failing to find and hold that the agreement was not terminated by Records' receipt of actual notice that Christensen had terminated the agreement.

Records cross-appealed. Records assigns two errors in his cross-appeal. He contends that the district court erred (1) in holding that Neb. Rev. Stat. § 45-104 (Reissue 1993) did not authorize prejudgment interest and (2) in holding that Neb. Rev. Stat. § 45-103.02 (Reissue 1993) is the only statute authorizing prejudgment interest and that it operates to the exclusion of § 45-104.

Although the parties argue that this case is an equitable action, it really is an action at law because Records seeks money damages from Christensen for breach of the agreement as Christensen allegedly failed to terminate the agreement according to the contractual notice provision. See *Lone Cedar Ranches v. Jandebeur, ante* p. 769, 523 N.W.2d 364 (1994). In reviewing the district court's judgment for errors appearing on the record, an appellate court will not substitute the district court's factual findings where competent evidence supports those findings. *Davis v. Wright*, 243 Neb. 931, 503 N.W.2d 814 (1993). Furthermore, the amount of damages to be awarded is solely for the fact finder, and its action in this respect will not be disturbed on appeal if it is supported by the evidence and bears a reasonable relationship to the elements of the damages proved. *Schuessler v. Benchmark Mktg. & Consulting*, 243 Neb. 425, 500 N.W.2d 529 (1993).

Christensen's first assignment of error is that the district court erred in failing to find and hold that Records' absence

from his normal duties constituted a material breach of the agreement. However, Records failed to argue this assignment of error either in his brief or during oral argument. We therefore need not consider it. See, *Grote v. Meyers Land & Cattle Co.*, 240 Neb. 959, 485 N.W.2d 748 (1992); *In re Interest of A.C.*, 239 Neb. 734, 478 N.W.2d 1 (1991).

Christensen's second assignment of error is that the district court erred in finding and holding that there was no mutual mistake between the parties sufficient to support a reformation of the agreement; Christensen contends that the mutual mistake under which the parties were acting was that they would be actively engaged in the practice of medicine. A party's right to reformation of an agreement depends on whether the agreement reflects the parties' intent. *Jelsma v. Acceptance Ins. Co.*, 233 Neb. 556, 446 N.W.2d 725 (1989). A court may reform an agreement when there has been either a mutual mistake or a unilateral mistake caused by fraud or inequitable conduct of the other party. *Id.*; *Ridenour v. Farm Bureau Ins. Co.*, 221 Neb. 353, 377 N.W.2d 101 (1985). To overcome the presumption that the agreement correctly expresses the parties' intent and to obtain reformation, the party seeking reformation must offer clear, convincing, and satisfactory evidence. *Jelsma, supra*; *Ridenour, supra*. Clear and convincing evidence is evidence " 'which produces in the trier of fact a firm belief or conviction about the existence of the fact to be proved.' " *Haines v. Mensen*, 233 Neb. 543, 547, 446 N.W.2d 716, 719 (1989).

In the case at bar, Christensen seeks reformation of the agreement based on an alleged mutual mistake. A mutual mistake is:

> "a belief shared by the parties, which is not in accord with the facts. . . . A mutual mistake is one common to both parties in reference to the instrument to be reformed, each party laboring under the same misconception about their instrument. . . . 'A mutual mistake exists where there has been a meeting of the minds of the parties and an agreement actually entered into, but the agreement in its written form does not express what was really intended by the parties.' "

Jelsma, 233 Neb. at 559, 446 N.W.2d at 728 (quoting *Newton v. Brown*, 222 Neb. 605, 386 N.W.2d 424 (1986) (quoting *Sierra Blanca Sales Co., Inc. v. Newco Industries, Inc.*, 84 N.M. 524, 505 P.2d 867 (N.M. App. 1972), *cert. denied* 84 N.M. 512, 505 P.2d 855)).

The district court found that Christensen had failed to produce clear and convincing evidence to support a finding that a mutual mistake existed sufficient to support reforming the agreement. Christensen also has failed to show in this court how this finding made by the district court was clearly erroneous. In fact, Christensen testified that he would have honored the agreement even if Records had stopped his activities with regard to patient care. Such action would have effectively limited Records to performing only administrative duties, not practicing medicine, as Records had already relinquished his surgical duties. Therefore, Christensen's argument that the parties' agreement should be reformed due to mutual mistake is not supported by competent evidence in the record and is without merit.

Christensen's third assignment of error is that the district court erred in failing to find and hold that Christensen had properly terminated the agreement by instructing the Professional Fees Office to discontinue the 50-50 fee distribution. Paragraph 2 of the agreement provides that "[t]he arrangement shall be terminable . . . by either of us giving thirty days [sic] notice to the other." Although the parties argue at great length about the definition of "notice" under their agreement, that issue is irrelevant in light of Christensen's testimony. The agreement unequivocally required the party desiring to terminate the agreement, Christensen, to personally give notice to the other party, Records, of his intention to terminate the agreement. Christensen testified that he personally had never contacted Records to inform Records of his intention to terminate the agreement. Therefore, the district court properly determined that Christensen was in breach.

Finally, Records, in his cross-appeal, contends that the district court erred by failing to award him prejudgment interest. We have previously held that, to receive prejudgment interest, a litigant must comply with § 45-103.02. *Sayer v.*

Bowley, 243 Neb. 801, 503 N.W.2d 166 (1993); *Elson v. Pool*, 235 Neb. 469, 455 N.W.2d 783 (1990). See *Knox v. Cook*, 233 Neb. 387, 446 N.W.2d 1 (1989). Section 45-103.02 applies to all causes of action arising on or after January 1, 1987, and provides in relevant part:

> [J]udgment interest shall also accrue on decrees and judgments for the payment of money from the date of the plaintiff's first offer of settlement which is exceeded by the judgment until the rendition of judgment if all of the following conditions are met:
>
> (1) The offer is made in writing upon the defendant by certified mail, return receipt requested, to allow judgment to be taken in accordance with the terms and conditions stated in the offer;
>
> (2) The offer is made not less than ten days prior to the commencement of the trial;
>
> (3) A copy of the offer and proof of delivery to the defendant in the form of a receipt signed by the party or his or her attorney is filed with the clerk of the court in which the action is pending; and
>
> (4) The offer is not accepted prior to trial or within thirty days of the date of the offer, whichever occurs first.

Records' cause of action did not accrue until 1989; as a result, § 45-103.02 clearly applies. In addition, the record contains no evidence that Records complied with § 45-103.02. Records therefore was not entitled to prejudgment interest on his judgment as he failed to comply with § 45-103.02's requirements. Consequently, the district court properly denied Records' request for prejudgment interest.

Although Records argues that § 45-104 provides an alternative statute to § 45-103.02, under which to award a party prejudgment interest, we have previously rejected that argument. *Knox, supra*. But see *id.* (White, Boslaugh, and Fahrnbruch, JJ., dissenting). Section 45-104 merely provides the interest rate on prejudgment interest in specific types of actions. However, even if a litigant's action is one of those actions listed in § 45-104, that party first must comply with the requirements of § 45-103.02 to be entitled to prejudgment interest at that rate. Therefore, Records' argument that he is

entitled to prejudgment interest is without merit.

For these reasons, we affirm the district court's order.

AFFIRMED.

IMPERIAL EMPIRE TRADING CO., INC., A NEBRASKA CORPORATION, APPELLANT, V. CITY OF OMAHA, A MUNICIPAL CORPORATION, APPELLEE.

524 N.W.2d 314

Filed December 2, 1994. No. S-93-082.

1. **Appeal and Error.** A district court's factual determination in a bench trial in an action at law has the same effect as a jury verdict and will not be set aside unless clearly wrong.
2. **Conversion: Damages.** The measure of damages for conversion is the market value of the converted property at the time of the conversion.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Affirmed in part, and in part reversed and remanded with direction.

Richard L. Anderson and Robert S. Lannin, of Croker, Huck, Kasher, DeWitt, Anderson & Gonderinger, P.C., for appellant.

Herbert M. Fitle, Omaha City Attorney, Thomas O. Mumgaard, and Mary M. Elliston for appellee.

HASTINGS, C.J., WHITE, CAPORALE, FAHRNBRUCH, and WRIGHT, JJ., and BOSLAUGH, J., Retired.

WHITE, J.

Imperial Empire Trading Co., Inc. (Imperial), appeals from the order of the district court awarding only nominal damages for the conversion and wrongful destruction of property seized by the City of Omaha (City).

On November 25, 1988, Omaha police received a phone call from one of Imperial's former employees informing them that Imperial had in its possession electronic devices used to unscramble cable television signals; the employee also informed police that Imperial had been selling these devices.

The police obtained a warrant to search Imperial's property. The police search produced more than 200 items that it thought constituted contraband.

Imperial was charged with theft of services. Imperial moved to suppress the seized property, and the county court granted Imperial's motion. The police concluded that the property seized represented contraband and, without notifying Imperial or obtaining court approval, destroyed the electronic devices. The charges against Imperial were subsequently dismissed. Imperial thereafter instituted this action against the City for conversion and wrongful destruction of property.

The district court held that the City was liable for both conversion and wrongful destruction of property, but concluded that no lawful market existed outside the cable industry for the destroyed property. The district court therefore awarded Imperial $1 in nominal damages. Imperial appealed to the Nebraska Court of Appeals. We removed this case from the Court of Appeals pursuant to our authority to regulate the caseloads of the appellate courts.

Imperial contends that the district court erred in awarding it only nominal damages based on the district court's erroneous determination that no lawful market existed for the seized property. The district court's determination that no lawful market existed outside the cable industry was factual. A district court's factual determination in a bench trial in an action at law has the same effect as a jury verdict and will not be set aside unless clearly wrong. *Woodmen of the World Life Ins. Soc. v. Kight, ante* p. 619, 522 N.W.2d 155 (1994); *Heese Produce Co. v. Lueders*, 233 Neb. 12, 443 N.W.2d 278 (1989). In the case at bar, the district court's factual determination that no lawful market existed was clearly wrong.

The record establishes that a lawful market did in fact exist for the property seized by the City. The evidence shows that (1) the equipment was listed in consumer catalogs for sale to the general public, (2) Imperial's competitors also advertised in these catalogs, (3) this equipment could be purchased on the open market either individually or in bulk, (4) consumers could use their own equipment and those who did would receive a $1-per-month credit for using their own equipment, (5) the

value to Cox Cable Omaha of a descrambler is $250, (6) a market for this equipment exists outside the cable industry, (7) possession of such equipment is lawful, (8) the market for this equipment is not declining due to wireless cable equipment, and (9) only the ultimate use of this equipment may be unlawful, not its sale. In light of this evidence admitted at trial, we are compelled to conclude that the district court clearly erred in finding that no lawful market existed outside the cable industry.

Since the City's actions in destroying the property it had seized from Imperial constituted a conversion, Imperial must be properly compensated for its loss. "The measure of damages for conversion is the market value of the converted property at the time of the conversion." *Chadron Energy Corp. v. First Nat. Bank*, 221 Neb. 590, 603, 379 N.W.2d 742, 750 (1986). Therefore, the judgment of the district court is affirmed in part and reversed in part, and the cause is remanded for determination of the proper amount of damages.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTION.

LANPHIER, J., not participating.

LESLIE D. SCHLAKE, M.D., APPELLANT AND CROSS-APPELLEE, V. LOREN H. JACOBSEN, M.D., AND CENTRAL NEBRASKA MEDICAL CLINIC, P.C., APPELLEES AND CROSS-APPELLANTS.

524 N.W.2d 316

Filed December 2, 1994. No. S-93-251.

1. **Summary Judgment: Appeal and Error.** In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
2. **Summary Judgment.** Summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
3. **Summary Judgment: Proof.** A party moving for summary judgment has the

burden to show that no genuine issue of material fact exists and must furnish sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law if the evidence presented remains uncontroverted. After the moving party has shown facts entitling it to judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents a judgment as a matter of law for the moving party.

4. **Trial: Appeal and Error.** An appellant may not predicate error on a motion not ruled upon.
5. **Summary Judgment: Abandonment.** The filing of a motion to amend is inconsistent with a motion for summary judgment and constitutes a de facto abandonment of the prior motion for summary judgment.
6. **Contracts: Parties: Time.** An agreement to make a future contract is not binding unless all terms are agreed upon and nothing is left for future negotiation. A contract is not formed if the parties contemplate that something remains to be done to establish contractual arrangements or if elements are left for future arrangement.
7. **Courts: Judgments: Appeal and Error.** When the record indicates the decision of the trial court is correct, although for reasons different from those relied upon below, an appellate court will affirm the trial court's decision.
8. **Actions: Reformation.** As a general rule, reformation of written instruments may be had by the immediate parties thereto and by those standing in privity with them. A person not a party or privy to the transaction in question with a substantial interest therein may not maintain the action.
9. **Pleadings.** Where it is apparent that a party in default has a meritorious defense to the action, the trial court must permit an answer to be filed.
10. **Courts: Pleadings.** The court cannot deprive a suitor of a substantial right under the plea of an exercise of discretion.
11. **Judges: Words and Phrases: Appeal and Error.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.
12. **Prejudgment Interest: Time.** A litigant must comply with Neb. Rev. Stat. § 45-103.02 (Reissue 1993) in order to receive prejudgment interest in actions accruing after January 1, 1987.
13. **Trial: Verdicts: Juries: Damages.** It is proper for a trial court to resubmit a case to a jury which returns an initial verdict for the defendants, despite an admission by the defendants that the plaintiff is owed some damages.

Appeal from the District Court for Custer County: RONALD D. OLBERDING, Judge. Affirmed.

Robert E. Wheeler for appellant.

Robert P. Chaloupka, of Van Steenberg, Chaloupka, Mullin, Holyoke, Pahlke, Smith, Snyder & Hofmeister, P.C., for appellees.

HASTINGS, C.J., WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ., and BOSLAUGH, J., Retired.

LANPHIER, J.

Leslie D. Schlake, M.D., brought this action against Loren H. Jacobsen, M.D., and the Central Nebraska Medical Clinic, P.C. (Clinic). In Schlake's amended petition, filed in the district court for Custer County, he (1) alleged that Jacobsen and the Clinic breached a stock redemption agreement, (2) alleged that Jacobsen and the Clinic breached an oral agreement concerning a billing system, (3) alleged that Jacobsen and the Clinic breached an employment agreement, and (4) sought to have a billing contract construed and reformed. The trial court granted summary judgment for the defendants on the second and fourth causes of action and on parts of the third cause of action. A jury trial on the remaining causes of action resulted in a $75,000 verdict for Schlake.

BACKGROUND

In 1973, Jacobsen and a Dr. M.L. Chaloupka formed the Clinic and were the only shareholders. Later in the 1970's, Dr. Douglas Holtmeier bought into the Clinic. Subsequently, Chaloupka died and Holtmeier resigned. As of July 21, 1985, when Schlake was hired by the Clinic, the Clinic was in the process of paying Chaloupka's estate and Holtmeier for the value of their respective shares of the Clinic. In 1989, after Chaloupka's estate and Holtmeier were paid off, Schlake bought into the Clinic. Schlake paid $50,000 for 33 1/3 shares of the Clinic pursuant to a stock purchase agreement. In 1991, Schlake resigned and commenced this action.

Schlake resigned after a dispute with Jacobsen concerning payments made by the Clinic to Jacobsen for computers, software, and billing services pursuant to a contract referred to as the "P.C. Billing Agreement." Schlake charged Jacobsen with overbilling the Clinic. Schlake wanted Jacobsen to reimburse the Clinic for the amount of the alleged overbilling, and Jacobsen refused.

FIRST CAUSE OF ACTION

After his resignation, Schlake exercised his option for stock

redemption pursuant to the stock redemption agreement. In his petition, Schlake claims that Jacobsen and the Clinic breached the stock redemption agreement by failing to tender payment for his stock. Schlake claims he is owed $100,000 for his stock. Jacobsen disputes that $100,000 is the redemption price for Schlake's 33 1/3 shares, but admits that Schlake is owed at least $50,000 for Schlake's stock.

SECOND CAUSE OF ACTION

Schlake contends that he is owed $64,751.88 and interest thereon in the amount of $18,837.69, for the breach of an oral agreement. Schlake alleges Jacobsen agreed to terminate the P.C. billing agreement once Jacobsen recovered his investment in the computer billing system. According to Schlake, Jacobsen received a reasonable rate of return on his investment, 16 percent per annum, on October 1, 1987. Schlake therefore contends that payments of $150,585.77, made by the Clinic to Jacobsen after October 1, were in violation of the agreement and should not have been deducted from gross profits in calculating the amount owed to Schlake.

The significance of this alleged breach is derived from the terms of Schlake's employment agreement. In addition to a base salary of $18,000, Schlake was to receive a percentage of the quarterly net income equal to the percentage of gross income he produced. The payments under the terms of the P.C. billing agreement reduced the Clinic's quarterly net income and, consequently, Schlake's income.

THIRD CAUSE OF ACTION

The third cause of action, entitled "Breach of Employment Agreement," has four parts. Schlake maintains that Jacobsen and the Clinic have breached the terms of his employment agreement (1) by retaining profits of $199,689, (2) by failing to terminate the P.C. billing agreement when Jacobsen recovered his investment, (3) by paying Jacobsen under the terms of the P.C. billing agreement after its expiration and thereby reducing the Clinic's net income and consequently reducing Schlake's income under his employment agreement, and (4) by failing to pay Schlake's medical malpractice insurance after his resignation.

FOURTH CAUSE OF ACTION

Finally, Schlake maintains that the terms of the P.C. billing agreement were contrary to those authorized by the Clinic as evidenced by the minutes of a special board of directors meeting. Schlake contends that the P.C. billing agreement is therefore void.

ASSIGNMENTS OF ERROR

Schlake asserts that the district court erred (1) in failing to grant his motions for summary judgment on each of the four causes of action, (2) in granting Jacobsen and the Clinic's motion for summary judgment on the second and fourth causes of action, (3) in overruling Schlake's objection to Jacobsen and the Clinic's late answer, (4) in granting Jacobsen and the Clinic's motion for summary judgment on parts of Schlake's third cause of action, and (5) in refusing to grant Schlake's motion for prejudgment interest.

STANDARD OF REVIEW

In appellate review of a summary judgment, the court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *In re Estate of Wagner, ante* p. 625, 522 N.W.2d 159 (1994); *Zwingman v. Kallhoff*, 244 Neb. 514, 507 N.W.2d 894 (1993); *Murphy v. Spelts-Schultz Lumber Co.*, 240 Neb. 275, 481 N.W.2d 422 (1992); *Spittler v. Nicola*, 239 Neb. 972, 479 N.W.2d 803 (1992). Moreover, summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *In re Estate of Wagner, supra*; *Zwingman, supra*; *Murphy, supra*; *Moore v. Hartford Fire Ins. Co.*, 240 Neb. 195, 481 N.W.2d 196 (1992); *Barelmann v. Fox*, 239 Neb. 771, 478 N.W.2d 548 (1992).

A party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must furnish sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law if the evidence

presented remains uncontroverted. After the moving party has shown facts entitling it to judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents a judgment as a matter of law for the moving party. *Ev. Luth. Soc. v. Buffalo Cty. Bd. of Equal.*, 243 Neb. 351, 500 N.W.2d 520 (1993); *Howard v. Blue Cross Blue Shield*, 242 Neb. 150, 494 N.W.2d 99 (1993).

SUMMARY JUDGMENT

Schlake's first contention on appeal is that the district court erred in failing to grant his motion for summary judgment on each of his four causes of action. Because the first and third causes of action were treated the same procedurally, they will be discussed together. Thereafter, the second and fourth causes of action will be discussed.

FIRST AND THIRD CAUSES OF ACTION

Asserting that there were no genuine issues of material fact and that they were entitled to judgment as a matter of law, Jacobsen and the Clinic moved for summary judgment on the second, third, and fourth causes of action. Then Schlake moved the district court for summary judgment on each of his four causes of action. After Schlake filed his motion for summary judgment, he moved to amend his petition concerning the first and third causes of action. The district court heard Jacobsen and the Clinic's motion for summary judgment at the same time as Schlake's motion to amend. Schlake's motion to amend the first and third causes of action contained in his petition was granted. The district court also ruled on the motions for summary judgment on the second and fourth causes of action only. No ruling on Schlake's motion for summary judgment on the first and third causes of action appears in the record.

> [W]here the moving party, before the determination of the motion, proceeds in the action in a manner inconsistent with the object of the motion, the latter is abandoned or waived, as by making an inconsistent motion in the cause, by going to trial on the merits, or by taking some step in the cause, before the hearing of the motion, which renders the motion unnecessary.

60 C.J.S. *Motions & Orders* § 42 at 63 (1969).

We have held that an appellant may not predicate error on a motion not ruled upon. *State v. Blair*, 227 Neb. 742, 419 N.W.2d 868 (1988). See, also, *Hiway 20 Terminal, Inc. v. Tri-County Agri-Supply, Inc.*, 235 Neb. 207, 454 N.W.2d 671 (1990) (where no ruling appeared to have been made on motion, it was presumed that motion was waived or abandoned); *Dewey & Stone v. Lewis*, 12 Neb. 306, 11 N.W. 330 (1882) (held that no case was presented for review where for no apparent reason motion was not acted upon, and no bill of exceptions was filed). In this case, the filing of the motion to amend was inconsistent with the motion for summary judgment and constituted a de facto abandonment of the prior motion for summary judgment. In any event, summary judgment on the first cause of action would have been inappropriate, as a genuine issue of material fact was raised by the conflicting evidence on the redemption price.

The trial court did, however, rule on Jacobsen and the Clinic's motion for summary judgment, filed after the amended petition, concerning parts of Schlake's third cause of action. The trial court granted summary judgment for Jacobsen and the Clinic on those parts entitled "Breach of Oral Agreement to Terminate Lease Upon Recovery of Investment" and "Breach of P.C. Billing Agreement." The trial court granted the motion, concluding that the claims made in these parts of the third cause of action were identical to those made in the second and fourth causes of action. We agree. Following is our determination on those issues.

SECOND CAUSE OF ACTION

Now, we address Schlake's assignments of error concerning the district court's granting of summary judgment in favor of Jacobsen and the Clinic on the second cause of action. In his second cause of action, Schlake maintained that Jacobsen and the Clinic breached an oral agreement. Schlake alleged that the oral agreement was not the same as, but concerned, Jacobsen's billing agreement with the Clinic. Under the billing agreement, the Clinic leased from Jacobsen a computer and software designed to conduct the Clinic's billing. In his amended

petition, Schlake specifically alleged the following:

> 17. That plaintiff [Schlake] first negotiated with the defendants concerning employment with them in the Fall of 1984; that at that time the parties discussed the matter of a certain computer separately owned by Dr. Jacobsen and rented to the Clinic for purposes of billing.
>
> 18. That in the course of the negotiations for employment in the Fall of 1984 the plaintiff expressed concern over the effect that the computer would have upon his future ownership in equal shares in Central Nebraska Medical Clinic, P.C. which defendants promised as an inducement to employment; and plaintiff told defendants that a continuing lease of the computer system to the professional corporation, without termination date, was unacceptable to him.
>
> 19. That in response, Dr. Jacobsen assured the plaintiff that when he had recovered his investment, his lease would terminate, and he would either reduce the rent to a normal rent for a system of that kind and value at the time, or would sell the system to the professional corporation at the fair market value at the time of sale.
>
> 20. That the plaintiff reasonably relied upon the representations and promises of Dr. Jacobsen to his detriment, and accepted employment with the defendants.

In granting Jacobsen and the Clinic's motion for summary judgment, the district court concluded that the evidence adduced established that there was no meeting of the minds concerning the alleged oral agreement. Absent a meeting of the minds, there could be no contract and, therefore, nothing to breach. Given the standard of review, the issue we must address is whether the evidence, when viewed in a light most favorable to Schlake, the party against whom judgment was granted, established a genuine issue of material fact to prevent entry of judgment as a matter of law.

There was very little evidence presented regarding the terms of the oral agreement. Schlake discussed the terms of the oral agreement in his deposition. The deposition contains the following:

> [Counsel for appellees:] What was your position in

regard to the computer at that point?

[Schlake:] My position was that he should be held to the original proposal which he gave me in 1984.

Q That was what?

A He discussed the computer with me on my initial visit here. I think the visit was in September as best I can recall. I came up and Jake [Jacobsen] had driven me around town. We ended up at his house. He was discussing the practice. We discussed my salary.

. . . .

He assured me at that point that they intended to recoup their investment, take the tax credit, and then some adjustment would be made with the computer, either to sell it to the corporation or to some way reduce the charge to eliminate it as an outside business interest. That was specifically discussed in his house on his couch in September of '84.

During a deposition, Jacobsen also testified as follows about the oral agreement:

[Counsel for appellant:] Do you recall telling Dr. Schlake that when you had purchased the equipment, the computer equipment, that you would continue with the lease until you had recovered your investment? Do you recall that?

[Jacobsen:] Yes, that was discussed.

Q Is that what you told him?

A Not totally.

Q What did you totally tell him?

A You are using partial.

Q That is why I'm asking. What did you tell him concerning that?

A I told him that the computer system had been purchased, the things I have just talked to you about, and that at such time as whenever it got paid for, if then he wanted a portion of that, that could be discussed and we could negotiate. That is what was discussed at that time.

. . . .

Q You told him that during that first set of interviews before he became an employee?

A That's correct.

Viewing this evidence in the light most favorable to Schlake, we conclude that the trial court erred in determining that there was no meeting of the minds. Clearly, Jacobsen agreed to negotiate the computer billing system with Schlake once Jacobsen recouped his investment. To that extent, there was a meeting of the minds. However, a mere agreement to later negotiate cannot constitute a contract. An agreement to make a future contract is not binding unless all terms are agreed upon and nothing is left for future negotiation. *Sayer v. Bowley*, 243 Neb. 801, 503 N.W.2d 166 (1993); *Viking Broadcast Corp. v. Snell Publishing Co.*, 243 Neb. 92, 497 N.W.2d 383 (1993). A contract is not formed if the parties contemplate that something remains to be done to establish contractual arrangements or if elements are left for future arrangement. *Hawkins Constr. Co. v. Reiman Corp.*, 245 Neb. 131, 511 N.W.2d 113 (1994); *Logan Ranch v. Farm Credit Bank*, 238 Neb. 814, 472 N.W.2d 704 (1991).

In the case at hand, Schlake's deposition testimony conclusively establishes that essential terms of the future contract were not decided. Schlake repeatedly testified that the oral agreement was not reduced to writing or incorporated into an employment agreement because the parties could not agree on the terms. He testified:

> [Counsel for appellees:] Verbal contract. What were the terms of the verbal contract in regard to the P.C. System, computer system?
>
> [Schlake:] We came to terms on the other contract. Basically, I said what is Jake taking? He was taking retirement, health insurance, and then a basic wage, expense account, and then production. I said whatever that is — what's good for the goose is good for the gander. We split it that way.
>
> We discussed the computer, and Jake said the computer contract is what the computer contract is and offered no other at that point in time.
>
> Q He did not indicate any willingness at that point to change the situation that was ongoing?
>
> A It [had] already become a sticky point by the end of

one year, yes.

Q All right.

A It was the main reason that no written contract was signed because he would not offer one with any agreement regarding the P.C. Billing in it, so I would not sign any contract.

Q Is it a fair statement that there was no meeting of the minds in regard to —

A There was no meeting of the minds in regard to the computer, but it was already to the point it was causing a great deal of friction at the end of one year.

Q That takes us then to March of 1989. There came a time in March of '89 that you signed another written agreement.

A Yes, I did.

Q Was the computer system part of that written agreement?

A No, sir.

Q Why not?

A. Again, there was no meeting of the minds. It was still a point of friction. We had several discussions of how to settle it. Jake again assured me that it would be settled.

I believe it was at that time that we discussed purchasing another computer to replace it, and then make that part of the corporation so that it would no longer be a sticking point. Nothing ever came about from that, even though assurances were made that it would be settled.

In light of the foregoing, the granting of summary judgment on the second cause of action was appropriate, although for different reasons than those offered by the trial court. See *Ev. Luth. Soc. v. Buffalo Cty. Bd. of Equal.*, 243 Neb. 351, 500 N.W.2d 520 (1993) (when the record indicates the decision of the trial court is correct, although for reasons different from those relied upon below, an appellate court will affirm the trial court's decision). See, also, *Douglas Cty. Bank & Trust v. Stamper*, 244 Neb. 226, 505 N.W.2d 693 (1993).

FOURTH CAUSE OF ACTION

With respect to the fourth cause of action, entitled

"Equitable Action to Construe and Reform Billing Contract," Schlake asserts that the trial court erred in granting summary judgment in favor of Jacobsen and the Clinic. He further contends that he should have been granted summary judgment.

As a general rule, reformation of written instruments may be had by the immediate parties thereto and by those standing in privity with them. A person not a party or privy to the transaction in question with a substantial interest therein may not maintain the action. *National Am. Ins. Co. v. Continental Western Ins. Co.*, 243 Neb. 766, 502 N.W.2d 817 (1993).

The parties to the contract were Jacobsen and the Clinic. Schlake was not a party to the billing contract; neither was he in privity with either of the parties. Schlake does not have standing to seek a reformation of the contract. The district court's grant of summary judgment was appropriate. Hence, this assignment of error is meritless.

LATE ANSWER

Schlake also assigns as error the district court's overruling of his objection to Jacobsen and the Clinic's late answer. The parties do not dispute that the answer was filed late. At issue is whether the trial court properly overruled Schlake's objection.

A party in default may be permitted to answer upon such terms as to the payment of costs as may be prescribed by the court, at any time before judgment is rendered. *Anest v. Chester B. Brown Co.*, 169 Neb. 330, 99 N.W.2d 615 (1959). And where it is apparent that the party in default has a meritorious defense to the action, the trial court must permit the answer to be filed. The court cannot deprive a suitor of a substantial right under the plea of an exercise of discretion. *Id.* Such matters rest largely within the discretion of the trial court, and an abuse of discretion must affirmatively appear to justify a reversal on such a ground. *Id.*

A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *State v. Fahlk, ante* p.

834, 524 N.W.2d 39 (1994). The trial court did not abuse its discretion in allowing the late answer.

PREJUDGMENT INTEREST

In his last assignment of error, Schlake asserts that the trial court erred in refusing to award Schlake prejudgment interest. Schlake submits that since Jacobsen admitted that $50,000 was the minimum redemption amount due, he was entitled to prejudgment interest on that portion of his $75,000 award. Schlake's claim is meritless. We have held that a litigant must comply with Neb. Rev. Stat. § 45-103.02 (Reissue 1993) in order to receive prejudgment interest in actions accruing after January 1, 1987. *Sayer v. Bowley*, 243 Neb. 801, 503 N.W.2d 166 (1993). Section 45-103.02 provides:

> Except as provided in section 45-103.04, judgment interest shall also accrue on decrees and judgments for the payment of money from the date of the plaintiff's first offer of settlement which is exceeded by the judgment until the rendition of judgment if all of the following conditions are met:
>
> (1) The offer is made in writing upon the defendant by certified mail, return receipt requested, to allow judgment to be taken in accordance with the terms and conditions stated in the offer;
>
> (2) The offer is made not less than ten days prior to the commencement of the trial;
>
> (3) A copy of the offer and proof of delivery to the defendant in the form of a receipt signed by the party or his or her attorney is filed with the clerk of the court in which the action is pending; and
>
> (4) The offer is not accepted prior to trial or within thirty days of the date of the offer, whichever occurs first.

These causes of action accrued after January 1, 1987. Therefore, prejudgment interest cannot be awarded to a litigant who has failed to meet the requirements of § 45-103.02. There being no evidence that § 45-103.02 was complied with, Schlake is not entitled to prejudgment interest. The district court properly denied Schlake's request for prejudgment interest.

CROSS-APPEAL

On cross-appeal, Jacobsen and the Clinic claim that the district court erred when it refused to accept the jury's verdict for them, sending the jury back to deliberate. In support of their argument, Jacobsen and the Clinic rely on *Volker v. First Nat'l Bank*, 26 Neb. 602, 42 N.W. 732 (1889). In *Volker*, the plaintiff brought an action against the defendant to recover usurious interest. The jury returned a verdict for the plaintiff and awarded $16.60. However, the defendant had admitted that it had taken $21.50 in illegal interest from the plaintiff. The trial court overruled the plaintiff's motion for new trial, but rendered judgment for the plaintiff in the amount of $50. When the trial court's action was challenged on appeal this court stated:

> When the only available error is in the computation of damages, the court *may, if the proof is undisputed on that point, or the facts are admitted*, render a judgment, with the defendant's consent, according to such proof or admitted facts, notwithstanding a verdict for a lower sum, instead of granting a new trial upon that ground alone.

(Emphasis supplied.) *Id.* at 606, 42 N.W.2d at 733.

Volker is distinguishable, and the rule contained therein is inapplicable here. The rule is not obligatory. We said a court "may" render a judgment if certain conditions have been met. Further, the conditions under which the rule is applicable have not been met. The amount of damages for breach of the redemption agreement was disputed, although Jacobsen and the Clinic admitted that Schlake was owed at least $50,000.

Schlake maintains that the applicable rule is contained in *Bushey v. French*, 171 Neb. 809, 108 N.W.2d 237 (1961). There, the jury returned with a verdict for the plaintiff, but awarded " '$ No Money.' " *Id.* at 810, 108 N.W.2d at 238. The trial court accepted the verdict. On appeal, this court determined that the trial court's acceptance of such a verdict was erroneous. *Bushey, supra*. Concluding that a jury assessment of " '$ No Money' " is no verdict at all, this court determined that the proper course would have been to return the case to the jury with directions to follow the instructions. In *Bushey*, the initial verdict was for the plaintiff. The case at hand differs. Here, the jury initially

returned a verdict for the defendants, Jacobsen and the Clinic. Despite this slight difference, we believe the court acted properly in sending the case back to the jury. Jacobsen and the Clinic's admission that at least $50,000 was owed under the terms of the redemption agreement required a verdict for Schlake. Given that the exact amount was in dispute, a factual issue remained. Rather than interpreting a jury's verdict to mean that it considered the amount of damages to be no greater than that admitted by the defendants, the better course is to resubmit the issue before the jury is discharged. The district court followed the correct course of action.

CONCLUSION

In light of the foregoing, the judgment of the district court is affirmed.

AFFIRMED.

OMEGA CHEMICAL COMPANY, INC., APPELLANT, V. WILMA C. ROGERS, APPELLEE.

524 N.W.2d 330

Filed December 2, 1994. No. S-93-269.

1. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such a party the benefit of all reasonable inferences deducible from the evidence.
2. **Summary Judgment.** Summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts, and that the moving party is entitled to judgment as a matter of law.
3. **Real Estate: Conveyances.** A covenant against encumbrances promises the grantee that no encumbrances, liens, or servitudes exist against the land as of the date of the conveyance.
4. **Real Estate: Conveyances: Words and Phrases.** An encumbrance, within the meaning of a covenant against encumbrances, is every right to, or interest in, the land, to the diminution in value of the estate, but consistent with the passage of the fee by the conveyance.

5. **Deeds: Real Estate: Conveyances: Limitations of Actions.** An action for damages for breach of a covenant of warranty contained in a deed conveying land is an action upon a specialty and must be brought within 5 years after the cause of action accrues; this rule applies in actions for damages for breach of a covenant against encumbrances.
6. **Conveyances.** A covenant against encumbrances is broken when made if an encumbrance exists, and the grantee's right of action against the grantor accrues at once thereon.
7. **Title: Conveyances: Limitations of Actions.** A covenant against encumbrances is a present engagement that the grantor has an unencumbered title, and is not in the nature of a covenant of indemnity. The statute of limitations, therefore, commences to run at once upon the breach of the covenant.
8. **Conveyances: Limitations of Actions.** When an encumbrance has been barred by the passage of the statute of limitations, there is no violation of the covenant.
9. **Actions: Title: Conveyances.** A cause of action on a covenant of warranty or for quiet enjoyment does not accrue in favor of the covenantee until eviction or surrender by reason of a paramount title.
10. **Real Estate: Title: Conveyances: Warranty.** Covenants of quiet enjoyment and covenants of warranty in conveyances of real property may be breached by an eviction, actual or constructive, by reason of the hostile assertion of a paramount title holder.
11. **Title: Warranty: Words and Phrases.** A paramount title is one which prevails in an action or is successfully asserted; a covenant of warranty is not violated by the existence of an outstanding, but unfounded, claim upon the property.
12. **Evidence: Trial: Rules of the Supreme Court.** Admissions that a party has not sought to withdraw or amend conclusively establish the matter admitted.
13. **Real Estate: Title: Conveyances: Costs.** A grantee that has succeeded in establishing its title against one without a valid claim to the premises may not recover from a grantor the expenses of the lawsuit, because the adverse claim of the third party does not constitute a breach of the covenants by the grantor.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Affirmed.

Duane M. Katz for appellant.

James D. Buser, of Gaines, Mullen, Pansing & Hogan, for appellee.

HASTINGS, C.J., WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ., and BOSLAUGH, J., Retired.

FAHRNBRUCH, J.

Omega Chemical Company, Inc. (Omega), appeals a district court's dismissal of its action for damages against Wilma C. Rogers for her failure to defend the title to property Omega had

purchased from Rogers and her late husband, Franklin P. Rogers.

We affirm the action of the district court for Douglas County in entering summary judgment in favor of Rogers and in dismissing Omega's claim.

STANDARD OF REVIEW

In reviewing a summary judgment, an appellate court views the evidence in a light most favorable to the party against whom the judgment is granted and gives such a party the benefit of all reasonable inferences deducible from the evidence. *LaBenz Trucking v. Snyder, ante* p. 468, 519 N.W.2d 259 (1994); *Barta v. Kindschuh, ante* p. 208, 518 N.W.2d 98 (1994). Summary judgment is to be granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts, and that the moving party is entitled to judgment as a matter of law. *Id.*

FACTS

Giving Omega the benefit of all reasonable inferences deducible from the evidence, we find the facts of this case are as follows:

On September 16, 1985, the Rogerses sold a parcel of land located in Ralston to Omega, a Nebraska corporation. The deed conveying title to Omega and executed by "Franklin P. Rogers and Wilma C. Rogers, husband and wife," states in part:

> And the grantor does hereby covenant with the grantee and with the grantee's heirs and assigns that grantor is lawfully seised of said premises; that they are free from encumbrance except easements and protective covenants of record[;] that grantor has good right and lawful authority to convey the same; and that grantor warrants and will defend the title to said premises against the lawful claims of all persons whomsoever.

In 1989, while doing construction, Omega discovered a sewerline, not of record, running across the property in a north-south direction. Upon investigation, Omega believed

that a neighboring company, Flexible Foam Products, Inc. (Flexible Foam), had an interest in the sewerline. The neighboring property was owned at least in part by the Eli Zalkin Testamentary Trust (Zalkin Trust).

A representative of Flexible Foam, who was also a trustee of the Zalkin Trust, informed Omega that Flexible Foam was the user of the sewerline, but that the sewerline was owned and operated by the City of Ralston (City). Omega then requested that the City remove the sewerline. The City ultimately informed Omega that the sewerline was a private one which was not owned or maintained by the City, and refused Omega's request.

On June 27, 1991, Omega made a demand that Wilma Rogers defend the title to the property, which Rogers refused to do. On July 3, Omega sued Rogers for damages for the "diminished value of said property by reason of said sewer line." Omega alleged that the sewerline constituted an encumbrance and cloud upon the property, contrary to the warranty provided by "the Franklin P. Rogers [sic]," and that the sewerline damaged and would continue to damage the property if not removed. Omega also filed in the county court for Douglas County an application to file a late claim against the estate of Franklin Rogers, then deceased. Although the record does not reflect the county court's ruling on the application, we assume that the application was overruled, there being no indication in the record presented us that the estate of Franklin Rogers was ever a party to the present lawsuit.

On October 10, Rogers answered, admitting that a demand had been made upon her to defend the title and that she had refused such demand, and generally denying the remaining allegations of Omega's petition. Rogers also affirmatively alleged that Omega's claim for breach of warranty against encumbrances was barred by the applicable statute of limitations; that the sewerline was not within the scope of the warranty against encumbrances; and that she did not, at any time material, have knowledge of the alleged encumbrance.

On October 23, Omega filed an equity action to quiet title naming Flexible Foam, the Zalkin Trust, the City, and others as

defendants. The Zalkin Trust then asserted a counterclaim on the basis that it had acquired an easement by prescription. On January 11, Rogers filed a motion for summary judgment in Omega's law action, and on January 21, Omega filed a motion for partial summary judgment. On January 28, 1993, Flexible Foam, the Zalkin Trust, and other related entities filed disclaimers of all right, title, interest, or possession in or to the real property described in Omega's petition to quiet title.

On February 9, 1993, after a hearing in which the court took judicial notice of the quiet title action, the district court entered summary judgment in favor of Rogers and dismissed Omega's law action against Rogers for damages.

In so doing, the court noted that Omega had admitted, in response to a request for admissions by Rogers, that no person or entity had been deemed by any court to have established in any way an easement or other right to construct or maintain the sewerline, that the City had denied any interest in the sewerline, and that no person or entity had any right to construct or maintain the sewerline.

The district court further stated that, "[t]here being no . . . claim which might impair the title or right of use of the property by [Omega], the presence of the pipeline . . . may constitute a trespass, but does not constitute a breach of warranty against encumbrance as alleged by [Omega]."

Omega timely appealed to the Nebraska Court of Appeals. The case was removed from the Court of Appeals to this court pursuant to our authority to regulate the caseloads of the appellate courts of this state.

ASSIGNMENTS OF ERROR

Omega contends that the district court erred in (1) finding and holding that there was no claim, lien, charge, security interest, easement, right of way, or any other claim which might impair the title or right of use of the property by Omega; (2) failing to find that persons had made claim against the subject property by virtue of the presence of the sewerline and by allegations in a counterclaim in Omega's quiet title action that the sewer was lawfully on the property; (3) sustaining Rogers' motion for summary judgment; and (4) overruling Omega's

motion for partial summary judgment.

ANALYSIS

We first determine whether the district court erred in sustaining Rogers' motion for summary judgment, as that issue is dispositive of this appeal.

Omega's law action requesting damages for the presence of the unrecorded sewerline, which Omega refers to in its petition as an "encumbrance" upon the subject property, may be characterized as a suit for breach of the covenants of title contained in the warranty deed conveying the property from the Rogerses to Omega.

The warranty deed has its origins in the English common law. 6A Richard R. Powell, The Law of Real Property ¶ 897[1][b] (1993). However, the notion of common-law warranty was never a part of the law in this country, and the law of personal covenants developed in order to protect the purchaser of real property. *Id.*

"The personal covenants of title can take six separate forms. These are the covenants of (1) seisin, (2) right to convey, (3) freedom from encumbrances, (4) warranty, (5) quiet enjoyment, and (6) further assurances. . . . A deed might contain any one or more of the above covenants." *Id.*, ¶ 900[1] at 81A-130.

The deed conveying the subject property from the Rogerses to Omega contained the covenants of seisin, right to convey, freedom from encumbrances, and warranty. The covenants of seisin and right to convey assure the grantee that the grantor, at the time of the conveyance, was seised of the land and had the right to convey the land, respectively. 6A Powell, *supra*, ¶ 897[1][b]. Omega does not allege in its petition that Rogers is in breach of these two covenants of title. Neither does Omega allege that Rogers is in breach of the covenant of further assurances. That covenant is one by which the grantor guarantees that he or she will do further acts necessary to assure title. *Id.*, ¶ 900[2][f].

A covenant against encumbrances promises the grantee that no encumbrances, liens, or servitudes exist against the land as of the date of the conveyance. *Id.*, ¶ 897[1][b]. An

encumbrance, within the meaning of a covenant against encumbrances, is "every right to, or interest in, the land, to the diminution in value of the estate, but consistent with the passage of the fee by the conveyance." *Chapman v. Kimball*, 7 Neb. 399, 403 (1878). Accord, *Hartman v. Drake*, 166 Neb. 87, 87 N.W.2d 895 (1958); *Albin v. Parmele*, 73 Neb. 663, 103 N.W. 304 (1905).

Omega, in its petition, characterized the sewerline as an encumbrance on the property contrary to the warranty provided by the Rogerses. Rogers affirmatively alleged in her answer, and now argues on appeal, that any claim by Omega for breach of the covenant against encumbrances is barred by the applicable statute of limitations.

Neb. Rev. Stat. § 25-205(1) (Reissue 1989) provides that "an action upon a specialty, or any agreement, contract, or promise in writing, or foreign judgment, can only be brought within five years." This court has long held that an action for damages for breach of a covenant of warranty contained in a deed conveying land is an action upon a specialty and must be brought within 5 years after the cause of action accrues. *Cape Co. v. Wiebe*, 196 Neb. 204, 241 N.W.2d 830 (1976); *Campbell v. Gallentine*, 115 Neb. 789, 215 N.W. 111 (1927); *Bellamy v. Chambers*, 50 Neb. 146, 69 N.W. 770 (1897); *Kern v. Kloke*, 21 Neb. 529, 32 N.W. 574 (1887). This rule applies in actions for damages for breach of a covenant against encumbrances. See, e.g., *Cape Co. v. Wiebe, supra*; *Johnson v. Hesser*, 61 Neb. 631, 85 N.W. 894 (1901); *Bellamy v. Chambers, supra*.

A covenant against encumbrances is broken when made if an encumbrance exists, and the grantee's right of action against the grantor accrues at once thereon. *Schuler-Olsen Ranches, Inc. v. Garvin*, 197 Neb. 746, 250 N.W.2d 906 (1977); *Cape Co. v. Wiebe, supra*. See, also, *Chapman v. Kimball*, 7 Neb. at 404 (holding that a covenant against encumbrances is "a present engagement that the grantor has an unencumbered title, and is not in the nature of a covenant of indemnity. The statute of limitations, therefore, commences to run at once upon the breach of the covenant").

Neither of the parties disputes that the sewerline was in existence at the time of the conveyance. Thus, Omega's cause of

action for breach of the covenant against encumbrances accrued on September 16, 1985, the date that the Rogerses conveyed the subject property to Omega by warranty deed. Omega filed suit against Rogers on July 3, 1991, more than 5 years after its cause of action accrued.

Therefore, there was no genuine issue of material fact before the trial court on any cause of action arising from breach of the covenant against encumbrances. "When an encumbrance has been barred by the passage of the statute of limitations . . . there is no violation of the covenant." 6A Richard R. Powell, The Law of Real Property ¶ 900[2][c] at 81A-138 (1993). Assuming, without deciding, that the sewerline constitutes an encumbrance upon the subject property, we hold that any claim against Rogers arising from an alleged breach of the covenant against encumbrances is time barred by § 25-205(1).

We next determine if there exist any genuine issues of material fact as to whether Rogers breached the covenants of warranty and quiet enjoyment contained in the warranty deed. A covenant of warranty has been considered by this court to be tantamount to a covenant for quiet enjoyment, with the breach of the latter also being a breach of the former. See, *Campbell v. Gallentine, supra*; *Cheney v. Straube*, 35 Neb. 521, 53 N.W. 479 (1892). For purposes of analysis, we will consider these two covenants together.

In contrast to a breach of a covenant against encumbrances, a cause of action on a covenant of warranty or for quiet enjoyment does not accrue in favor of the covenantee until eviction or surrender by reason of a paramount title. See, *Hooker and Heft v. Estate of Weinberger*, 203 Neb. 674, 279 N.W.2d 849 (1979); *Campbell v. Gallentine, supra*; *Cheney v. Straube, supra*. See, also, Neb. Rev. Stat. § 76-207 (Reissue 1990) ("[c]ovenants of quiet enjoyment and covenants of warranty in conveyances of real property may be breached by an eviction, actual or constructive, by reason of the hostile assertion of a paramount title holder"). Thus, we must inquire whether Omega has been evicted by, or surrendered the property to, a paramount titleholder.

"A paramount title is one which prevails in an action or is successfully asserted. . . . [A] covenant of warranty is not

violated by the existence of an outstanding, but unfounded, claim upon the property." *Eggers v. Mitchem*, 240 Iowa 1199, 1202, 38 N.W.2d 591, 592 (1949). See, also, *A. C. Drinkwater, Jr., F, Inc. v. Ellot H. Raffety F, Inc.*, 495 S.W.2d 450 (Mo. App. 1973).

Omega's responses to Rogers' requests for admissions prove fatal to Omega's case:

> REQUEST NO. 2. No person or entity has been granted, either expressly or impliedly, an easement, license, or any other property right to construct and/or maintain the sewer pipeline alleged in . . . [Omega's] Petition.
>
> ANSWER NO. 2. Admitted.
>
> REQUEST NO. 3. No person or entity has been deemed by any court of competent jurisdiction to have established by prescription, necessity, or otherwise, an easement, license, or other right to construct or maintain the sewer pipeline alleged in . . . [Omega's] Petition.
>
> ANSWER NO. 3. Admitted.
>
> REQUEST NO. 4. The City of Ralston has denied any interest in the sewer pipeline alleged in . . . [Omega's] Petition.
>
> ANSWER NO. 4. Admitted.
>
> REQUEST NO. 5. No person or entity has any right, legal, equitable, prescriptive, or by necessity to construct or maintain the sewer pipeline alleged in . . . [Omega's] Petition.
>
> ANSWER NO. 5. Admitted.

Requests for admissions are governed by Neb. Ct. R. of Discovery 36 (rev. 1992). Subsection (b) of that rule states in part: "Any matter admitted under this rule is *conclusively established* unless the court on motion permits withdrawal or amendment of the admission." (Emphasis supplied.) See, also, *NI Indus. v. Husker-Hawkeye Distributing*, 233 Neb. 808, 448 N.W.2d 157 (1989) (holding that admissions that a party has not sought to withdraw or amend conclusively establish the matter admitted). There is no indication in the record that Omega ever sought to withdraw or amend its admissions. Omega's own admissions conclusively establish that there has been no hostile

assertion by a paramount titleholder as to the subject property.

Omega attempts to argue that, although Flexible Foam, the Zalkin Trust, and others *now* disclaim interest in the property, Flexible Foam had *initially* claimed an interest, and that Rogers, having agreed to defend the title, was obligated to obtain a determination that the sewerline was not rightfully on the property, rather than Omega's being put to the expense of litigating the quiet title action.

However, the Rogerses, in the warranty deed conveying the property to Omega, covenanted that they would "defend the title to said premises against the *lawful* claims of all persons whomsoever." (Emphasis supplied.) Because Omega has admitted that no one has a lawful claim against the property, Rogers had no duty to defend the title. Moreover, a grantee that has succeeded in establishing its title against one without a valid claim to the premises may not recover from a grantor the expenses of the lawsuit, because the adverse claim of the third party does not constitute a breach of the covenants by the grantor. See, e.g., *A. C. Drinkwater, Jr., F., Inc. v. Ellot H. Raffety F., Inc., supra*. Cf. *Chaney v. Haeder*, 90 Or. App. 321, 752 P.2d 854 (1988) (holding that warranty deed statute requires grantor to indemnify grantee for costs if grantee, in good faith, unsuccessfully defends title, but that the covenant does not extend to adverse claims that are without legal foundation).

Inasmuch as Omega has admitted that no person or entity has a legal right to construct or maintain the sewerline, Rogers has no duty to either defend or indemnify Omega for the costs of the quiet title action, and the trial court correctly sustained Rogers' motion for summary judgment.

There being no genuine issue of fact as to whether there was a valid claim by a paramount titleholder to the subject property, a material fact, there can be no breach of the covenants of warranty or quiet enjoyment as a matter of law. Because this issue is dispositive of the appeal, it is not necessary for us to consider Omega's remaining assignments of error.

CONCLUSION

There being no genuine issues of material fact, and Rogers being entitled to summary judgment as a matter of law, the

district court's order sustaining Rogers' summary judgment motion and dismissing Omega's petition is affirmed.

AFFIRMED.

RENEE M. HARDER, APPELLANT AND CROSS-APPELLEE, V. RONALD W. HARDER, APPELLEE AND CROSS-APPELLANT.

524 N.W.2d 325

Filed December 2, 1994. No. S-93-714.

1. **Child Custody: Appeal and Error.** In the absence of an abuse of discretion, a trial court's decision bearing upon the custody of minor children will not be disturbed on appeal.
2. **Child Custody.** Generally, before a court will permit the removal of a minor child from the jurisdiction, the custodial parent must satisfy the court that there is a legitimate reason for leaving the state and that it is in the minor child's best interests to continue to live with that parent.
3. _____. As a general rule, all other circumstances being equal, legitimate career changes of the custodial parent, whether they be job-related or matrimonial in nature, will support an application for changing the residence of a child placed in that parent's custody.
4. _____. Neither community ties nor a reduction in visitation necessarily mandates prohibiting a custodial parent from relocating for a legitimate reason.

Petition for further review from the Nebraska Court of Appeals, SIEVERS, Chief Judge, and IRWIN and MILLER-LERMAN, Judges, on appeal thereto from the District Court for Douglas County, ROBERT V. BURKHARD, Judge. Judgment of Court of Appeals reversed, and cause remanded with directions.

Mary Lee Skaff for appellant.

Debra Margrave for appellee.

HASTINGS, C.J., WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ., and BOSLAUGH, J., Retired.

WRIGHT, J.

Renee M. Harder seeks further review of the decision of the Nebraska Court of Appeals which affirmed the order of the

Douglas County District Court denying her application for consent to move to Arizona with her son, Garrett W. Harder.

SCOPE OF REVIEW

In the absence of an abuse of discretion, a trial court's decision bearing upon the custody of minor children will not be disturbed on appeal. *Demerath v. Demerath*, 233 Neb. 222, 444 N.W.2d 325 (1989).

Generally, before a court will permit the removal of a minor child from the jurisdiction, the custodial parent must satisfy the court that there is a legitimate reason for leaving the state and that it is in the minor child's best interests to continue to live with that parent. *Id.*

FACTS

Renee and Ronald W. Harder were married on October 24, 1983. Renee filed a petition for dissolution of marriage in 1989. A temporary order granting custody of their son, Garrett, born March 29, 1987, was entered in favor of Renee. The decree of dissolution awarded custody of Garrett to Renee, with reasonable rights of visitation for Ronald, but no specific visitation schedule was provided.

After the divorce, Renee and her minor son began living with James Melichar. In 1993, Melichar sold his underground sprinkler business, which he had operated for 18 years, and planned to move to Arizona and begin a sprinkler business there, where he could work year-round.

On March 18, 1993, Ronald filed an application for permanent custody of Garrett. Ronald remarried on March 20. On April 22, Renee filed an application for consent to move to Arizona with Garrett. Renee and Melichar were married in Arizona on May 5. At the time of the hearing on the applications, Melichar had obtained a job as a foreman for Blooming Desert Landscape and Renee had obtained a job as an assistant to a real estate broker in Arizona. They had leased a house and had located a school and a day-care center for Garrett.

The guardian ad litem's written report to the court concluded that both parties were fit and proper persons to have custody of Garrett. The guardian noted that Renee had been Garrett's

primary caregiver and had done a good job in caring for Garrett's physical needs. The guardian also found that Garrett was a well-adjusted child and that Garrett had a close emotional bond with Renee. Each of the parties informed the guardian that the other party was a good parent. The guardian found that Ronald had exercised regular visitation, telephoned Garrett two or three times per week, visited Garrett's school on numerous occasions, and attended a parent-teacher conference. The guardian reported that Ronald and Garrett shared a close relationship and that Garrett said he enjoyed spending time with his father.

The guardian determined that Renee's plan to move to Arizona was not designed to interfere with Ronald's visitation, but, rather, to be with her new husband. The guardian believed, however, that Renee failed to take into consideration the effect the move would have on Ronald's right to visit Garrett, as well as the child's right to continue his close-knit relationship with his father. The guardian said that the purpose of Renee's marriage to Melichar was to enhance the litigation, because she was not married at the time she planned to move to Arizona and because she told Ronald, when she informed him of her intent to move to Arizona, that she was not ready to marry Melichar. The guardian found it significant that Renee did not have a wedding ring 22 days after her marriage to Melichar and that Renee did not want Garrett in attendance at the marriage ceremony in Arizona. The guardian noted that Melichar found employment in Arizona after Renee's application for consent to move was filed and that Renee and Garrett did not have any extended family there. Both grandparents lived in Omaha, and Garrett had a close relationship with his maternal grandmother.

The guardian concluded that due to Garrett's age and his emotional bond with Renee, who at all times had been the primary caregiver, it would be in Garrett's best interests to remain in Renee's custody. However, the guardian determined that it was in Garrett's best interests that he also have an opportunity to maintain his close relationship with Ronald. The guardian stated that if Renee were allowed to move to Arizona, Garrett's relationship with his father would be significantly hindered.

The district court found that the desirability of having Garrett reside in proximity to Ronald and his extended family was superior to any reason that Renee might have for wanting to move to Arizona and that such a move would clearly prevent Ronald from maintaining a close paternal relationship with Garrett. The court found that it was in Garrett's best interests that he remain in Nebraska so that Ronald could continue to be a constant and positive force in Garrett's life. Renee was allowed to retain custody, provided that she remain in Nebraska. Renee appealed to the Court of Appeals, and Ronald cross-appealed. The Court of Appeals affirmed the district court's decision in all respects.

ASSIGNMENTS OF ERROR

On appeal to the Court of Appeals, Renee made seven assignments of error which can be condensed to assert that the district court erred in not permitting her to move to Arizona with her minor son. Renee's petition for further review asserts that the Court of Appeals erred in not finding that remarriage was a legitimate reason for removal and erred in finding that the child's best interests would not be met if Renee joined her new husband in Arizona. Ronald incorporated his cross-appeal into his brief on petition for further review, and he asserts that custody of Garrett should be awarded to him.

ANALYSIS

The issue in this case is whether the district court abused its discretion in refusing to allow Renee to remove Garrett from Nebraska. We have held that the court generally will permit the removal of a minor child from the jurisdiction if the custodial parent satisfies the court that there is a legitimate reason for leaving the state and that it is in the minor child's best interests to continue to live with that parent. *Demerath v. Demerath*, 233 Neb. 222, 444 N.W.2d 325 (1989).

By the time of the hearing on the applications, both Renee and Melichar had obtained jobs in Arizona. Renee's job would pay $800 to $850 per month. Melichar testified that his base salary in Arizona would be $24,000, plus commissions, and he was told that he could make $50,000 per year. Melichar had friends and an aunt who lived in Arizona. Melichar and Renee

had leased a three-bedroom ranch-style home, located on 1 acre, which had a fenced-in backyard. Renee had visited the school which Garrett would attend if they were permitted to move. Renee told the guardian ad litem that she wanted to move to Arizona to be with her husband, but that she would remain in Nebraska, if necessary, to retain custody of Garrett. Garrett told the court that he liked living with his mother and Melichar and that he would rather go to Arizona than stay in Omaha.

The Court of Appeals affirmed the district court's finding that it was more desirable for Garrett to remain in proximity to Ronald and his extended family than to be permitted to move to Arizona. In a memorandum opinion, the court stated:

> At a time when many fathers are purposely absent from their children's lives, Ronald has obviously made a sincere and concerted effort to contribute to his son's well-being. Consequently it is in Garrett's best interest that he stay in Nebraska so that Ronald can continue to be a constant and positive force in his life.

Two factors must be considered regarding the removal of a child from this state: whether the custodial parent has a legitimate reason for leaving the state and whether it is in the minor child's best interests to continue to live with that parent. See *Demerath v. Demerath, supra*. In *Demerath*, the mother had remarried, and she and her new husband wanted to move to another state for business reasons. We noted:

> " 'As a general rule, all other circumstances being equal, legitimate career changes of the custodial parent, whether they be job-related or matrimonial in nature, will support an application for changing the residence of a child placed in that parent's custody.' . . . If there is a legitimate reason for the custodial parent's decision to leave the jurisdiction, the minor child will be allowed to accompany the custodial parent if the court finds it to be in the best interests of the child to continue to live with that parent. . . . Custody is not to be interpreted as a sentence to immobility."

Demerath v. Demerath, 233 Neb. 222, 222-23, 444 N.W.2d 325, 325-26 (1989).

In *Boll v. Boll*, 219 Neb. 486, 363 N.W.2d 542 (1985), we held

that the trial court erred in refusing to allow a child to be moved to Tennessee with the mother, who had received training to work as an EEG technologist and had obtained a job in that field in the other jurisdiction. We approved of the move because employment as an EEG technologist was a considerable improvement over unemployment or work as a waitress and because the mother could not find a position in her field in Nebraska. "Obtaining employment when unemployed and finding employment with a substantial opportunity for increased earnings are reasonable and legitimate reasons for a custodial parent to move to another jurisdiction." *Id.* at 490, 363 N.W.2d at 545.

In *Boll*, the father argued that the child's community ties and extended family in the Omaha area were adequate reasons to deny the application to remove the child. We stated:

> Although we realize community ties are important factors to be considered, they do not mandate prohibiting a custodial parent from relocating for a legitimate reason. . . . "We do not feel that an award of custody to a parent should be interpreted as a sentence to immobilization." We will not place a custodial parent in the position of deciding between custody of one's child and a more successful career.

(Citation omitted.) *Id.* See, also, *State ex rel. Reitz v. Ringer*, 244 Neb. 976, 510 N.W.2d 294 (1994).

We found no abuse of discretion in the trial court's granting permission for the mother, the custodial parent, to remove the minor children to Sioux Falls, South Dakota, in *Jafari v. Jafari*, 204 Neb. 622, 284 N.W.2d 554 (1979). The mother accepted a job in South Dakota, supervising a training program. The new job included a small increase in salary and increased potential for career and salary advancement. The father argued that he would be able to provide guidance and assistance if the children remained in Omaha.

In *Maack v. Maack*, 223 Neb. 342, 389 N.W.2d 318 (1986), the mother was allowed to retain custody of two minor children and to remove them from the state. Although the record indicated that the mother was a fit parent, had a loving relationship with the children, and had a legitimate reason to

leave the state, the father argued that the children had close ties to their rural Nebraska community. We stated that community ties do not always preclude a custodial parent from relocating to another state. The mother had remarried and resided outside Nebraska with her second husband. The district court found that allowing the mother to retain custody and to remove the children to the new environment was consistent with the best interests of the children, and we affirmed.

In *Gerber v. Gerber*, 225 Neb. 611, 619, 407 N.W.2d 497, 503 (1987), we stated:

> In proceedings to dissolve a marriage, placing a child in the custody of a parent does not prevent the custodial parent's departure from the jurisdiction at the risk of losing child custody. . . .
>
> Before a court will permit removal of a child from the jurisdiction, generally, a custodial parent must establish that such removal is in the best interests of the child and must demonstrate that departure from the jurisdiction is the reasonably necessary result of the custodial parent's occupation, a factually supported and reasonable expectation of improvement in the career or occupation of the custodial parent, or required by the custodial parent's remarriage.

(Citations omitted.)

In *Hicks v. Hicks*, 223 Neb. 189, 388 N.W.2d 510 (1986), we reversed the trial court's transfer of custody to the mother and found that the father should have been allowed to remove the child from Nebraska. We held: "The noncustodial parent's visitation rights and the minor child's community ties are important factors to be considered. But neither community ties nor a reduction in visitation necessarily mandates prohibiting a custodial parent from relocating for a legitimate reason." *Id.* at 196, 388 N.W.2d at 515.

In the present case, the district court's order forces Renee to choose between her child and her new husband. The court denied Ronald's request for a change of custody, but also denied Renee's request that she be allowed to take Garrett with her to Arizona, where her new husband had obtained a job as a foreman for a landscape company and she had obtained

employment in a real estate office.

It is not disputed that Renee's main objective in seeking the court's permission to move Garrett to Arizona was to accompany her new husband. The district court found that it was in Garrett's best interests to remain with Renee, and we agree. However, we find that Renee had a legitimate reason to leave Nebraska. It follows, then, that Garrett should be allowed to leave the state with Renee. As we have stated, a custodial parent will not be placed in a position of deciding between custody of a child and a different career, whether it is job-related or matrimonial. *Korf v. Korf*, 221 Neb. 484, 378 N.W.2d 173 (1985).

Renee's remarriage and her new husband's move to Arizona, where he can work in his chosen field throughout the year, create legitimate reasons for Renee to move, regardless of the fact that she and her new husband obtained jobs and were married after she filed her application for permission to move Garrett. The district court abused its discretion in refusing to grant the application, and the Court of Appeals erred in affirming the district court's order. Our de novo review results in findings that the application for permission to remove Garrett from the jurisdiction should have been granted and that the district court should have entered an order permitting Renee to move to Arizona with Garrett. In light of these findings, Ronald's request for a change in custody is denied.

CONCLUSION

The judgment of the Court of Appeals is reversed, and the cause is remanded to that court with directions that it reverse the order of the district court and direct that the district court enter an order permitting Renee to move to Arizona with Garrett.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. ASA T. CARTER, APPELLANT.

524 N.W.2d 763

Filed December 2, 1994. No. S-93-777.

1. **Appeal and Error.** An appellate court does not consider errors which are argued but not assigned.
2. **Rules of Evidence: Other Acts.** Neb. Rev. Stat. § 27-404(2) (Reissue 1989) is a rule of inclusion, rather than exclusion, and permits the use of relevant bad acts for all purposes except to prove the character of a person in order to show that the person acted in conformity with that character.
3. _____: _____. Evidence which is otherwise admissible under Neb. Rev. Stat. § 27-404(2) (Reissue 1989) may be excluded under Neb. Rev. Stat. § 27-403 (Reissue 1989) if its probative value is substantially outweighed by other considerations.
4. **Rules of Evidence: Other Acts: Appeal and Error.** This court reviews the admission of evidence of other acts under Neb. Rev. Stat. § 27-404(2) (Reissue 1989) by considering (1) whether the evidence was relevant, (2) whether the evidence had a proper purpose, (3) whether the probative value of the evidence outweighed its potential for unfair prejudice, and (4) whether the trial court, if requested, instructed the jury to consider the evidence only for the purpose for which it was admitted.
5. **Rules of Evidence.** In all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the Nebraska Evidence Rules when judicial discretion is a factor involved in the admissibility of evidence.
6. **Rules of Evidence: Other Acts: Appeal and Error.** Because exercise of judicial discretion is implicit in Neb. Rev. Stat. § 27-401 (Reissue 1989), it is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts, and the trial court's decision will not be reversed absent an abuse of that discretion.
7. **Trial: Words and Phrases.** Judicial abuse of discretion means that the reasons or rulings of the trial court are clearly untenable, unfairly depriving a litigant of a substantial right, and denying a just result in matters submitted for disposition.
8. **Sexual Assault: Evidence: Other Acts.** Sexual crimes are offenses in which evidence of other similar sexual conduct has independent relevance, and such evidence may be admissible whether that conduct involved the complaining witness or third parties.
9. **Sexual Assault: Evidence: Other Acts: Proof.** Evidence of repeated incidents may be especially relevant in proving sexual crimes committed against persons otherwise defenseless due to age—either the very young or the elderly.
10. **Other Acts: Evidence.** Prior acts need not be identical to the act charged in order to be admissible. It is sufficient that the evidence be of similar involvement reasonably related to the charged conduct and be presented in a manner in which prejudice does not outweigh its probative value.
11. _____: _____. Where there are an overwhelming number of significant similarities, evidence of prior acts may be admitted.

12. _____: _____. The question in determining admissibility of evidence of prior acts is whether the crimes are so similar, unusual, and distinctive that the trier of fact could reasonably find that they bear the same signature. If so, the evidence may be admitted, and any dissimilarities merely go to the weight of the evidence.
13. **Trial: Evidence.** Balancing the probative value of evidence against the danger of unfair prejudice is also within the discretion of the trial court.
14. **Rules of Evidence.** The fact that evidence is prejudicial is not enough to require exclusion, because most, if not all, of the evidence a party offers is calculated to be prejudicial to the opposing party. It is only the evidence which has a tendency to suggest a decision on an improper basis that is unfairly prejudicial under Neb. Rev. Stat. § 27-403 (Reissue 1989).
15. **Trial: Evidence: Jury Instructions.** In any situation in which a limiting instruction was given at the time evidence was introduced, NJI2d Crim. 5.3 must be given at closing if requested.
16. **Trial: Statutes: Judgments: Time.** When there has been a subsequent change in the law, it is the duty of the trial court to render a decision which reflects any change in the applicable law which occurred in the interval between the time the judge made rulings of law and the time judgment is pronounced.
17. **Trial: Rules of Evidence: Expert Witnesses.** In a DNA case, the trial court is to decide preliminarily, outside the presence of the jury, on the basis of the evidence before it: (1) whether the witnesses on the DNA issue are experts in the relevant scientific fields, (2) whether DNA testing used in the case under consideration is generally accepted by the relevant scientific communities, (3) whether the method of testing used in the case under consideration is generally accepted as reliable if performed properly, (4) whether the test conducted properly followed the method, (5) whether PCR DNA analysis evidence is more probative than prejudicial under Neb. Rev. Stat. § 27-403 (Reissue 1989), and (6) whether statistical probability evidence interpreting PCR analysis results is more probative than prejudicial.
18. **Trial: Evidence.** The calculation of statistical probability is an essential part of the process used in determining the significance of a DNA match; therefore, the underlying method of arriving at the calculation must also meet the *Frye-Houser* general acceptance test.
19. _____: _____. Evidence of a DNA match will not be admissible if it has not been accompanied by statistical probability evidence that has been calculated from a generally accepted method.
20. **Rules of Evidence.** Although evidence may be relevant, Neb. Rev. Stat. § 27-403 (Reissue 1989) provides that it may be excluded if the evidence is more prejudicial than probative.
21. **Trial: Evidence: Appeal and Error.** To limit the statistical frequency evidence in DNA cases to two racial groups when the racial or ethnic background of the perpetrator is unknown is prejudicial under any circumstances.
22. **Criminal Law: Trial: Juries: Evidence: Appeal and Error.** In a jury trial of a criminal case, whether an error in admitting or excluding evidence reaches a constitutional dimension or not, an erroneous evidential ruling results in prejudice to a defendant unless the State demonstrates that the error was

harmless beyond a reasonable doubt.

23. **Verdicts: Juries: Evidence: Appeal and Error.** An error is harmless when the improper admission of evidence did not materially influence the jury to reach a verdict adverse to the substantial rights of the defendant.

24. _____: _____: _____: _____. It is harmless error only if the appellate court is convinced beyond a reasonable doubt that the erroneous admission of the evidence could have had no influence on the jury's judgment.

Appeal from the District Court for Douglas County: MICHAEL MCGILL, Judge. Reversed and remanded for a new trial.

Thomas M. Kenney, Douglas County Public Defender, and Thomas C. Riley for appellant.

Don Stenberg, Attorney General, and Donald A. Kohtz for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ.

PER CURIAM.

Following a trial by jury, the defendant, Asa T. Carter, was found guilty of first degree murder. The information alleged that the death of the victim had occurred during the perpetration of a sexual assault in the first degree. The defendant has appealed, assigning error on the part of the trial court in admitting testimony of prior bad acts by the defendant and in admitting evidence concerning DNA testing and the results thereof.

On October 20, 1990, at approximately 12:30 p.m., Omaha Police Officer Kevin Cunningham was advised that the body of the victim, a 9-year-old girl, had been found in an area immediately to the rear of the apartment house in Omaha in which the defendant resided with his wife, Gwelder Carter. Shortly thereafter, the defendant was arrested at the University of Nebraska Medical Center, where he was visiting his father. The defendant, along with his wife, was taken to the police station. Earlier that day, at approximately 12:15 p.m., Officer Cunningham had been directed to make contact with the defendant. At that time, the defendant told the officer that he had been informed that a little girl was missing and that a

warrant had been sworn out for him, and he wanted to know if he was wanted. After checking, the officer advised the defendant that there was no warrant on him.

Although Gwelder Carter initially indicated that the defendant had nothing to do with the victim's death, she later told police that he had been responsible. Most of the details leading up to this death were obtained through the testimony of the defendant's wife. According to her, on the evening of October 19, 1990, the victim stayed overnight at the apartment of the defendant and his wife. The defendant's wife was the victim's godmother, and she was considered by the victim's family to be her "second mother." The girl had previously stayed overnight at the Carters' home, although from the record it is unclear how many times this had occurred.

The victim arrived at the Carters' in the early evening. The defendant was present at the apartment when she arrived; however, he left shortly afterward. After the defendant left, two of his friends, Lanny Hicks and David Harpster, came looking for him. Only because it will become relevant during later discussions in this case, we point out that Hicks and Harpster were white, defendant was black. Shortly thereafter, the defendant returned home. During the course of the evening and into the early morning hours, the defendant, Hicks, and Harpster periodically came to and went from the apartment. During the coming and going, Gwelder Carter and the victim remained in the bedroom. At no time did Hicks and Harpster have any contact with the victim, and eventually, they left the apartment.

Gwelder testified that at approximately 4:15 a.m., the defendant came into the bedroom and got into bed. She stated that she could smell liquor on his breath. According to Gwelder, the defendant became sexually aroused and initially indicated that he wanted to "make love" to her, but then he stated that he wanted to make love to the victim, who was sleeping in the same bed as the defendant and his wife. The defendant told his wife that if she loved him or cared anything about him, she would let him make love to the victim. Upon hearing this, Gwelder left the apartment. When she left, the victim was asleep and wearing a blue nightgown. When she returned approximately

40 to 45 minutes later, she was met by the defendant, who stated, "I didn't mess with her." Upon hearing this, Gwelder entered their bedroom and observed the victim lying naked faceup on the bed. According to Gwelder's observations, the victim's body was limp and she had no pulse.

Gwelder further testified that the defendant threatened her. She stated that he told her that she must "stick by his side" or the "same thing could happen to [her]" and indicated that "if he [went] down," he would take her "down with him." She then left the apartment for a short time. When Gwelder returned, she watched the defendant carry the victim's then-clothed body out of the apartment.

When defendant returned a short time later, Gwelder watched him place the sheets from the bed into the bathtub, where other items were soaking. After doing this, the defendant left the apartment. Soon after he left, Gwelder telephoned the victim's mother and told her that her daughter was missing, that she had gone to the 7-Eleven store and when she returned, the girl was gone. The victim's mother contacted the Omaha Police Division, and a search for the victim was initiated. Shortly thereafter, Gwelder received a telephone call from the defendant, asking her to meet him at a friend's house. The friend, Margaret Williams, testified that the defendant arrived at her home at about 8 a.m. According to her, the defendant initially seemed normal; however, when someone he did not recognize knocked on her door, he looked through the peephole and told her, "Don't open the door, don't open the door," and she noticed that he started to act nervous. When Gwelder arrived at approximately 10 a.m., Williams heard her say to the defendant, "But, Asa, you know you were wrong, though." She also noticed that for approximately 5 or 10 minutes, they continued to talk quietly between themselves. After their conversation, the Carters left the Williams residence and walked to University Hospital to visit the defendant's father, who was a patient there at the time. During this walk, the defendant again threatened her. As previously stated, defendant was arrested on suspicion of murder later that day.

An autopsy of the victim's body revealed that she had been subjected to anal and vaginal penetration shortly before her

death and that the cause of her death was asphyxiation, most likely caused by the compression of her chest. Dr. Jerry Jones, the pathologist who performed the autopsy, testified that his examination detected the presence of sperm in her anus, and he concluded that the victim died because of "asphyxiation due to smothering and mechanical asphyxiation from overlaying by an adult during the act of sexual assault."

After this initial examination, laboratory tests were conducted at the Nebraska State Patrol Criminalistics Laboratory on evidence taken from the crime scene and on samples taken from the victim's body and clothing. Forensic serologist Vicki Cowan testified at trial that semen was present in the crotch and back area of the victim's underwear and on an anal swab taken from the victim. Evidence of human blood was also found on the vaginal and anal swabs, a red washcloth, a white towel, a blue shirt found in the bathtub, the fitted and flat sheets from the bed, the defendant's jacket pocket, fingernail scrapings taken from the victim, the victim's underwear, and the victim's blue jeans. One Caucasian head hair and one Negroid hair fragment were discovered on the outside of the victim's underwear.

According to Cowan, an examination revealed that the Negroid hair fragment was too small to make any identification and that the Caucasian head hair could not have come from either the defendant or the victim. Cowan stated that the presence of a Caucasian head hair does not mean the hair was on a person's head at the time of contact, but only that a Caucasian head hair came into contact with the outside of her underwear. Cowan further testified that the technology she had available at the Nebraska State Patrol Criminalistics Laboratory to test the samples had generated inconclusive test results—they neither included nor excluded the defendant.

The prosecution then elected to submit anal and vaginal swabs, as well as cuttings from the victim's underwear and the crotch area of her blue jeans, to "Life Codes," a New York laboratory, for restriction fragment length polymorphism (RFLP) DNA or "DNA fingerprint" testing in an attempt to identify the donor of the semen. The RFLP DNA methodology is discussed in detail in *State v. Houser*, 241 Neb. 525, 490

N.W.2d 168 (1992). Richard Cunningham, a scientist at Life Codes laboratory, testified that an initial analysis of the samples indicated that human sperm was present on the anal swab and the crotch and back areas of the victim's underwear. However, he was of the opinion that due to the degradation of the DNA samples, there was an insufficient amount of high molecular weight DNA in this case to permit RFLP DNA analysis.

After Life Codes determined it could not conduct RFLP DNA analysis on the samples, the samples were sent to Forensic Science Associates (FSA), a California laboratory, for polymerase chain reaction DNA amplification (PCR DQ Alpha DNA) analysis. The PCR DQ Alpha DNA test requires much less DNA material than the RFLP test and differs from the RFLP test in that it does not identify the donor of the sperm, but, rather, answers the question of whether a suspect can be eliminated as a donor.

FSA performed the tests and was able to identify sufficient quantities of DNA material to draw some conclusions. Jennifer Mihalovich, a criminalist from FSA, conducted the PCR test on the sperm found on the anal swab and the crotch area of the blue jeans. These are considered as donor's samples. She compared the donor's genotype with the genotype of the biological reference samples taken from the victim, the defendant, Hicks, and Harpster. The genotype of the donor matched that of the known reference sample of the defendant. As a result of her tests, Mihalovich concluded that the defendant could not be excluded as a possible donor of the sperm; however, each of the other males present at the Carter residence, Hicks and Harpster, could be eliminated based on nonmatching PCR genotypes.

In addition to the evidence of a match, the jury also heard evidence relating to the frequency with which one could expect to find such a match among samples taken from given populations. Mihalovich testified that approximately 7 percent of the white population and 10 percent of the black population has the same genotype as the defendant.

EVIDENCE OF PRIOR BAD ACTS

We discuss first the issue regarding the admission of prior

bad acts on the part of the defendant.

The State called as witnesses the half sister of the defendant, An. C., and the defendant's daughters from a previous marriage, L.C. and A.C. Each of these witnesses testified that as a young child, she had been sexually assaulted by the defendant.

An. C. testified that in 1979 or 1980, when she was 6 or 7 years old, the defendant would babysit her at his house. On several occasions when she spent the night, the defendant would vaginally and anally sexually assault her. According to her, this would not occur on a consistent basis, but only when she spent the night at his house. These sexual assaults stopped when she was 10 or 11. The defendant's daughter L.C. testified that when she was 7, she was placed in a foster home because the defendant sexually assaulted her. According to her, she did not report the defendant for a long time. Over the objections of the defendant, she also testified that she had been treated for gonorrhea when she was in the third grade.

A.C. testified that when she was 6 years old, she was also placed in a foster home because her father, the defendant, sexually assaulted her. She stated that the defendant would say, "I love you. You're my favorite child," when he wanted to have sex with her. These assaults would occur either in her bedroom or at her grandmother's house.

The defendant filed motions in limine to exclude the proffered testimony of his previous sexual assaults of his half sister, his daughters, and T.K., an acquaintance, on the basis that it violated Neb. Rev. Stat. §§ 27-403 and 27-404 (Reissue 1989). Following a hearing, the court sustained the defendant's motion as to the acquaintance and overruled the motions pertaining to the half sister and the two daughters. The court found that the proffered testimony was admissible to show motive, opportunity, intent, preparation, and identity. In a portion of the court's written order, the court stated:

> If the case of [T.K.] is excluded, an examination of the facts surrounding the sexual assaults of the other three victims, namely, [An. C., L.C., and A.C.], may provide potential answers for consideration by a jury. Each of these three victims was between the ages of six and twelve

> when they were subjected to multiple sexual assaults. [An. C.], at the time of her assaults, had Asa Carter, her brother, as her babysitter. [A.C. and L.C.], when their mother was not present, were in the care or custody of their father. In these circumstances, he subjected them to sexual assaults. Each of these three victims was very young and, under the law, incapable of giving consent. In each of these settings, Asa Carter was in a custodial role. In short, he had complete control. . . .
>
> When one reviews [§ 27-404(2)], words such as motive, opportunity, intent, preparation and identity seemingly jump off the written page. Surely these offenses would be relevant to a jury for consideration of these enumerated points. This Court finds sufficient similarity of the acts to conclude that they are relevant to this prosecution. Further, this Court believes that this analysis would apply to any jurisdiction.
>
> Next, the Court is required to do a balancing test under [§ 27-403]. The Court finds that it is clear that the probative value of this evidence outweighs the prejudice that may come to the Defendant.

Again over the objections of the defendant at trial, the court admitted the testimony of the half sister and two daughters and gave the jury a limiting instruction. The defendant appeals the denial of his motion and the subsequent admission of the testimony of L.C. and A.C. The defendant, in his brief, also raises an argument pertaining to the erroneous admission of An. C.'s testimony; however, he does not raise this issue in his assignments of error. The defendant's assignment of error relating to admission of other acts testimony challenges only the trial testimony of A.C. and L.C.

This court has held that an appellate court does not consider errors which are argued but not assigned. See *State v. Brandon*, 240 Neb. 232, 481 N.W.2d 207 (1992). See, also, *State v. Dyer*, 245 Neb. 385, 513 N.W.2d 316 (1994) (to be considered by an appellate court, an error must be assigned and discussed in the brief of one claiming that prejudicial error has occurred).

The statutes on which the defendant relies are §§ 27-404(2) and 27-403. This court has firmly established that § 27-404(2) is

a rule of inclusion, rather than exclusion, and permits the use of relevant bad acts for all purposes except to prove the character of a person in order to show that the person acted in conformity with that character. See, *State v. Perrigo*, 244 Neb. 990, 510 N.W.2d 304 (1994); *State v. Martin*, 242 Neb. 116, 493 N.W.2d 191 (1992); *State v. Stephens*, 237 Neb. 551, 466 N.W.2d 781 (1991); *State v. Yager*, 236 Neb. 481, 461 N.W.2d 741 (1990); *State v. Boppre*, 234 Neb. 922, 453 N.W.2d 406 (1990).

Section 27-404(2) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The list of acceptable uses recited in the statute is illustrative and not intended to be exclusive. *State v. Perrigo, supra*; *State v. Martin, supra*; *State v. Stephens, supra*; *State v. Yager, supra*. However, evidence which is otherwise admissible under § 27-404(2) may be excluded under § 27-403 if its probative value is substantially outweighed by other considerations. *State v. Wood*, 245 Neb. 63, 511 N.W.2d 90 (1994).

Therefore, we review the admission of evidence of other acts under § 27-404(2) by considering (1) whether the evidence was relevant, (2) whether the evidence had a proper purpose, (3) whether the probative value of the evidence outweighed its potential for unfair prejudice, and (4) whether the trial court, if requested, instructed the jury to consider the evidence only for the purpose for which it was admitted. *State v. Wood, supra*; *State v. Martin, supra*; *State v. Stueben*, 240 Neb. 170, 481 N.W.2d 178 (1992); *State v. Stephens, supra*.

In reviewing the admissibility of evidence, this court has instructed that in all proceedings where the Nebraska Evidence Rules apply, admissibility of evidence is controlled by the Nebraska Evidence Rules, not judicial discretion, except in those instances under the Nebraska Evidence Rules when judicial discretion is a factor involved in the admissibility of evidence. See *State v. Wood, supra*. Although the word "discretion," in one form or another, does not appear in either

Neb. Rev. Stat. § 27-401 (Reissue 1989) or § 27-403, nevertheless, judicial discretion, as a factor in admissibility, is implicit in § 27-401, concerning the admission of relevant evidence, and § 27-403, regarding exclusion of relevant evidence. *State v. Perrigo, supra.*

Because exercise of judicial discretion is implicit in § 27-401, it is within the discretion of the trial court to determine relevancy and admissibility of evidence of other wrongs or acts, and the trial court's decision will not be reversed absent an abuse of that discretion. *State v. Wood, supra*; *State v. Bronson*, 242 Neb. 931, 496 N.W.2d 882 (1993).

Judicial abuse of discretion means that the reasons or rulings of the trial court are clearly untenable, unfairly depriving a litigant of a substantial right, and denying a just result in matters submitted for disposition. *State v. Thomas*, 238 Neb. 4, 468 N.W.2d 607 (1991).

Bearing these standards in mind, we turn our attention to whether the evidence that the defendant had recurring sexual contact with his two daughters and his half sister is relevant to the charge of murder in the first degree in the commission of or the attempt to commit a sexual assault. The relevant portion of Neb. Rev. Stat. § 28-303 (Reissue 1989) provides: "A person commits murder in the first degree if he kills another person . . . (2) in the perpetration of or attempt to perpetrate any sexual assault in the first degree . . . ." Sexual assault in the first degree, as provided by Neb. Rev. Stat. § 28-319 (Reissue 1989), is as follows:

> (1) Any person who subjects another person to sexual penetration and (a) overcomes the victim by force, threat of force, express or implied, coercion, or deception, (b) knew or should have known that the victim was mentally or physically incapable of resisting . . . or (c) the actor is nineteen years of age or older and the victim is less than sixteen years of age is guilty of sexual assault in the first degree.

This court has consistently stated that sexual crimes are offenses in which evidence of other similar sexual conduct has independent relevance, and such evidence may be admissible whether that conduct involved the complaining witness or third

parties. See, *State v. Martin*, 242 Neb. 116, 493 N.W.2d 191 (1992); *State v. Stephens*, 237 Neb. 551, 466 N.W.2d 781 (1991); *State v. Craig*, 219 Neb. 70, 361 N.W.2d 206 (1985).

In *State v. Martin, supra*, this court noted that evidence of repeated incidents may be especially relevant in proving sexual crimes committed against persons otherwise defenseless due to age—either the very young or the elderly. Without proof by other acts of a defendant, except in cases of the fortuitous presence of an eyewitness, those crimes would likely go unpunished. Accord *State v. Stephens, supra*. See, also, *State v. Keithley*, 218 Neb. 707, 358 N.W.2d 761 (1984). Therefore, the trial court did not abuse its discretion in determining the evidence was relevant.

Next, we must determine whether the evidence had a proper purpose. The defendant contends that the only logical purpose for which this evidence could be admitted is to show his propensity to commit a sexual assault of a child, a purpose specifically excluded by statute.

We begin by looking at the numerous similarities between the sexual assaults of the half sister and daughters and the sexual assault of the victim in the present case.

* All of the assaults occurred when the victims were very young girls—ages 6 to 10 or 11 years old.
* All of the victims were subjected to multiple assaults.
* All of the assaults occurred at the defendant's residence, his mother's residence, or the victim's residence.
* All of the victims either had a familial or family-like relationship to defendant.
* All of the assaults occurred while the defendant had custody or was in complete control of the victims.
* Each of the victims, under the law, was incapable of giving consent.

Concededly, some differences between these crimes do exist. The defendant's relationship with the victim was not familial; however, it was family-like in that she was his wife's goddaughter. In addition, only An. C. testified that she had been subjected to anal penetration, as was the victim in this case. However, these differences, standing alone, do not compel the exclusion of the evidence. An absolute identity in

every detail cannot be expected. *State v. Phelps*, 241 Neb. 707, 722, 490 N.W.2d 676, 688 (1992) ("the prior acts need not be identical to the act charged in order to be admissible. It is sufficient that the evidence be of similar involvement reasonably related to the charged conduct and be presented in a manner in which prejudice does not outweigh its probative value").

Where there are an overwhelming number of significant similarities, the evidence of prior acts may be admitted. *State v. Bible*, 175 Ariz. 549, 858 P.2d 1152 (1993). "The term 'overwhelming' does not require a mechanical count of the similarities but, rather, a qualitative evaluation." *Id.* at 576, 858 P.2d at 1179. The question is whether the crimes are so similar, unusual, and distinctive that the trial judge could reasonably find that they bear the same signature. *Id.* If so, the evidence may be admitted, and any dissimilarities merely go to the weight of the evidence. *Id.* We agree with the reasoning of the Arizona court in *Bible*.

The evidence in this case shows enough similarities for purposes of identity. Moreover, the evidence shows the defendant was motivated in each instance to choose a victim that was of a very young and vulnerable age, and one with whom he had a familial or family-like relationship. The combination of these factors placed the defendant in a position in which he could both control and manipulate his victims. Therefore, the evidence is also relevant for the purpose of showing the defendant's motive. For these reasons, the trial court did not abuse its discretion in finding the evidence was for a proper purpose.

More problematic is the issue of whether the admission of this evidence was more prejudicial than probative. Balancing the probative value of the evidence against the danger of unfair prejudice is also within the discretion of the trial court. *State v. Phelps, supra*. The fact that the evidence is prejudicial is not enough to require exclusion, because most, if not all, of the evidence a party offers is calculated to be prejudicial to the opposing party. *Id.* It is only the evidence which has a tendency to suggest a decision on an improper basis that is unfairly prejudicial under § 27-403. *State v. Phelps, supra*. Accord *State*

v. Stephens, supra.

Because the first two factors under § 27-404(2) have been met, the question of whether the evidence was unfairly prejudicial hinges on whether the court properly instructed the jury as to its limited use. The court instructed the jury as follows:

> During this trial I told you that certain evidence was received for a limited purpose. Specifically, I refer to the testimony of [An. C., L.C., and A.C.] regarding alleged sexual assaults.
>
> Evidence of other crimes, wrongs, or acts should not be considered as proof that the Defendant acted in the same manner regarding the offense charged in this case.
>
> It may be proof of motive, opportunity, intent, preparation, plan and identity.
>
> The State of Nebraska is still required to prove beyond a reasonable doubt that the Defendant committed the offense with which he is charged on the date alleged in the Information filed by the State.

Also, at the time the evidence was first offered as to proof of other crimes, at the request of the defendant the trial court gave the following limiting instruction to the jury:

> Ladies and gentlemen, the request by counsel is a proper one that the case law requires that I do give what's called a limiting instruction. And that means that the evidence of this witness and any other witnesses that may be called to testify as to other crimes, that that testimony can only be received for a limited purpose.
>
> The first thing I would say to you is that under the statute, evidence of other crimes is not admissible to prove the character of a person, that is, meaning to try to prove a bad character by showing other crimes. And it is not allowable to show that the person in the offense charged, that is, the first degree murder charge here, it is not admissible to show that the person acted in conformity with that prior offense in this same offense that he's charged with in this court.
>
> The evidence may be admitted for other purposes, and this is a limited purpose. The statute provides that it may

> be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. . . .
>
> The main thing to emphasize is that you may not consider this evidence as to Mr. Carter's character, and in allowing testimony of other crimes, there is no change in the burden of proof. The burden of proof never shifts. It is always on the State of Nebraska to prove the offense of first degree murder beyond a reasonable doubt.

NJI2d Crim. 5.3 provides as follows: "During this trial I called your attention to some evidence that was received for specified limited purposes; you must consider that evidence only for those limited purposes and for no other." In any situation in which a limiting instruction was given at the time evidence was introduced, NJI2d Crim. 5.3 must be given at closing if requested. See, also, *State v. Dush*, 214 Neb. 51, 332 N.W.2d 679 (1983).

Although not following exactly the language of NJI2d Crim. 5.3, the trial court's instruction clearly directed the jury as to the limited use of the evidence. Because the evidence bears on the identity and motive of the assailant, it cannot be said that the evidence had a tendency to suggest a decision on an improper basis. Therefore, the trial court did not abuse its discretion in admitting the testimony of the defendant's prior sexual assaults.

WHETHER THE PCR DNA EVIDENCE WAS PROPERLY ADMITTED

The defendant, in his second assignment of error, asserts that the district court committed reversible error by allowing the admission of DNA evidence, and presents two arguments in support of his contention. He asserts that there is insufficient foundation for the reliability of PCR DNA methodology in forensics and that the procedure undertaken in the present case did not conform to the appropriate legal standard for determining the admissibility of DNA evidence. He also argues the absence of a reliable statistical data foundation.

In this case, we must consider for the first time the admissibility of evidence arising from the scientific technique of

PCR DNA typing in criminal prosecutions. In *State v. Houser*, 241 Neb. 525, 490 N.W.2d 168 (1992), previously cited and to which we will also refer later, this court dealt with RFLP DNA analysis. The trial court in the instant case did follow the holding of *Houser* and conducted a *Frye* hearing. See *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). Its rulings were based on the *Frye* test.

In order to understand the legal issues relating to the admissibility of PCR DNA typing, it first is necessary to have a basic understanding of the scientific principles and techniques underlying that method.

In forensics, PCR DNA typing utilizes a technique in which a known reference sample containing the defendant's DNA is typed and the results are compared with the DNA typing results obtained from the sample recovered from the crime scene. If the results do not match, the defendant is excluded as a possible donor. If the results do match, the defendant is included as a possible source of the evidence sample, and a statistical calculation is made to determine the probability that another individual would also match the evidence sample.

DNA Theory

According to Mihalovich, a criminalist employed by FSA, DNA is the organic material that contains the blueprint or code for the genetic characteristics of all living things. See, also, *State v. Houser, supra*. DNA is located in the chromosomes which are found in the nucleus of virtually every cell of the human body, including white blood cells, skin cells, semen cells, saliva cells, and cells surrounding hair roots. Within each individual, the DNA molecular structure is identical and remains constant throughout a human lifetime. What is particularly important for purposes of forensic application is the fact that no two individuals, with the exception of identical twins, have an identical DNA structure.

The molecular structure of DNA is commonly referred to as a "double helix" or twisted ladder similar to a spiral staircase. The sides of the ladder are composed of alternating molecules of sugar and phosphate. The "rungs" are composed of pairs of molecules called nucleotides. The most important component

of the nucleotide is its organic base units. There are only four organic bases: adenine (A), guanine (G), cytosine (C), and thymine (T). In any given nucleotide, A always pairs or bonds with T, while C always pairs with G. Consequently, if a nucleotide contains a C on one side, then it can be inferred that the nucleotide contains a G on the other side.

There are several million nucleotides in each molecule of DNA. It is the precise order in which A, T, C, and G occur along the DNA ladder that creates a code that determines the various unique physiological traits of each human being. The different nucleotide sequences correspond with different physiological traits. The majority of the DNA molecule is similar from one person to the next; however, there are segments or genes within the molecule that are highly variable. These highly variable segments are called polymorphic sites. Each version of a polymorphic gene is called an allele. Forensic PCR DNA typing looks at a specific polymorphic site in the DNA molecule located on chromosome number six, which is known to code for the human leukocyte antigen system (HLA) and which has a large number of allelic variations.

It is the combination of the polymorphic nature of the HLA system and the natural replication process of the DNA molecule that provides the basis for PCR DQ Alpha DNA typing. See *Spencer v. Com.*, 240 Va. 78, 393 S.E.2d 609 (1990).

Mihalovich went on to testify about how she received in her laboratory certain reference blood samples, which are those samples taken from a known person. In this case, she received samples from the victim and from the defendant, as well as from Harpster and Hicks. She also received oral, vaginal, and anal swabs of the victim, cuttings from a pair of underwear of the victim's, and a piece of blue denim that came from the victim's clothing.

The process by which Mihalovich processed the samples, including the reference samples, was then described. In this process, the sperm cells were separated from the remainder of the samples. From the reference samples, the victim's DQ Alpha type was determined to be type 1.2,1.2; the defendant's was found to be 4,4. The sperm found on the victim's blue jeans and the anal swab taken from the victim was DQ Alpha type

4,4, which, Mihalovich testified, was consistent with the known reference sample of the defendant. Reference samples from the two friends of the defendant's, Hicks and Harpster, were found to be type 1.1,3 and 2,3, respectively. That result, Mihalovich testified, would eliminate both of them as potential sources of the sperm found on the victim and her clothing. She continued to testify that comparing the DQ Alpha type 4,4 found in the stain on the victim's blue jeans and the defendant's reference blood, DQ Alpha type 4,4, the defendant could not be eliminated as a potential contributor of the sperm in the sample. As is apparent, PCR DQ Alpha DNA typing presumes only to determine that as a result of testing, the suspect either can be eliminated as the perpetrator or cannot be eliminated, as opposed to the more exact identifications which are possible by the RFLP DNA technique.

Mihalovich then testified that as she had previously explained, there are six DQ Alpha alleles, giving rise to 21 possible types within the population. Because there are more than 21 people in the world, more than one person can have the same DQ Alpha type. She then explained that there were statistics regarding known observations of DQ Alpha types in certain segments of the population based on data collected by Dr. Henry Erlich's laboratory, now at Roche Molecular System. There are other published papers that had collected these statistics, Mihalovich said. She testified that she did not have a degree in population genetics. She then explained how she had used data published in a scientific paper: R. Helmuth et al., *HLA DQ Alpha Allele and Genotype Frequencies in Various Human Populations, Determined by Using Enzymatic Amplification and Oligonucleotide Probes*, 47 Am. J. Hum. Genetics 515 (1990). She then stated that from an examination of these statistics, she determined that DQ Alpha type 4,4 occurs in approximately 8.9 percent of the black population and approximately 6.8 percent of the white population. She then explained that in using the Hardy-Weinberg equilibrium equation, see *State v. Houser*, 241 Neb. 525, 490 N.W.2d 168 (1992), she determined that approximately 10 percent of the black population and 7 percent of the white population would have a 4,4 DQ Alpha type. Finally, using *Statistical Abstract of*

the United States 1991, she determined as a weighted average that DQ Alpha type 4,4 occurs in an average of about 7.6 percent of the population in the United States, 6.9 percent in Nebraska, and 7.3 percent in Omaha.

It was upon this record that the trial court submitted the issue as to the identity of the defendant as the perpetrator of the crime, and this record which the defendant claims discloses prejudicial error requiring a reversal.

METHOD OF CALCULATING STATISTICAL PROBABILITY

In order to make a statistical evaluation of a declared match, it is necessary to know how frequently a genotype occurs in the relevant reference population. This process is determined according to population genetics principles as previously stated.

Mihalovich agreed that there were statistics regarding known observations of DQ Alpha type "in segments of the population and in certain segments of the population that are used to make that analysis." Those statistics come from a wide variety of sources, including FSA's collection of data made over a period of years, Dr. Erlich's laboratory, and other sources not confined to the forensics field.

Once the numbers are compiled, a statistical analysis is done to determine the percentage of the population that would have a particular DQ Alpha type. That is done for all 21 types. In doing that analysis, one method is the actual counting method, whereby one actually counts the number of people that have the particular type and/or the data are gathered from a number of people and counted as to how many times a particular type occurs within that population size. The other method is to calculate what the expected type would be using the formula referred to as the Hardy-Weinberg equation. Although Mihalovich is not a qualified population geneticist, she was permitted to give this testimony.

It is with this generalized testimony on the method of calculation of the statistical probability data in mind that we examine the defendant's contention that PCR DNA evidence was improperly admitted. However, to address this issue and those which follow, it is necessary to discuss the proper

evidentiary standard for determining the admissibility of PCR DQ Alpha test results, as this testing presents new scientific evidence.

LEGAL STANDARD FOR DETERMINING THE ADMISSIBILITY OF DNA EVIDENCE

The defendant contends that the appropriate legal standard is the test articulated by this court in *State v. Houser*, 241 Neb. 525, 490 N.W.2d 168 (1992), a case decided after the preliminary hearing but before the trial in the present case. In *Houser*, we instructed that the trial court must preliminarily decide, outside the presence of a jury, if certain foundational requirements were satisfied before DNA evidence could be admitted.

The State argues that *Houser* does not apply in the present case and offers two bases for the argument. One, the State argues that since the *Houser* opinion dealt with preliminary hearing guidelines and was decided after the trial court held a preliminary hearing regarding the admissibility of the DNA evidence, the trial court could not have erred in not following these guidelines, and therefore, the subsequent change in law regarding evidentiary determinations had no effect. Two, the State asserts the test set forth in *Houser* may be inapplicable because subsequent to this court's opinion in *Houser*, the U.S. Supreme Court, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, ____ U.S. ____, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), ruled that the *Frye* "general acceptance" test, the foundation of the *Houser* test, was superseded by the Federal Rules of Evidence, and is not a necessary precondition to the admissibility of scientific evidence. The State's arguments on this issue are inherently inconsistent and illustrate the necessity of stating the effect of a subsequent change in law.

When there has been a subsequent change in the law, it is the duty of the trial court to render a decision which reflects any change in the applicable law which occurred in the interval between the time the judge made rulings of law and the time judgment is pronounced. See *Happy Hour, Inc. v. Nebraska Liquor Control Commission*, 186 Neb. 533, 184 N.W.2d 630 (1971) (a statutory amendment relating to a matter of

procedure is applicable to pending cases which have not been tried). Since the trial court is bound by the existing statutory or case law, the fact that the court held a preliminary hearing does not eliminate the court's obligation to conform to existing law.

In the present case, the defendant objected at trial to the DNA evidence on the basis that the admissibility requirements did not conform to this court's ruling in *Houser*; therefore, the issue is preserved for appeal. The question now becomes whether the admissibility standard for DNA evidence is to be determined under *Houser* or *Daubert*.

Prior to the Supreme Court's ruling in *Daubert*, it was well established in Nebraska that the *Frye* test, as established in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), was the appropriate test to use in determining the admissibility of novel scientific evidence. The court in *Frye* set out a "general acceptance" test for the admissibility of testimony about scientific evidence. The *Frye* court noted: "[W]hile courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs." 293 F. at 1014. As one court has commented, the "*Frye* court assumed that general acceptance indicated reliability and that only reliable evidence should be admissible." *U.S. v. Jakobetz*, 955 F.2d 786, 794 (2d Cir. 1992), *cert. denied* ____ U.S. ____, 113 S. Ct. 104, 121 L. Ed. 2d 63. One of the primary objectives of this test is to shield jurors from misleading or prejudicial scientific testimony. This rationale is based on the concern that (1) lay jurors tend to be overly impressed by science, (2) lay jurors lack the capacity to evaluate such scientific evidence critically, and (3) lay jurors are likely to give unreliable scientific testimony more weight than it deserves. Another benefit of *Frye* is protecting the courts from unproven and potentially erroneous scientific theories until those theories have been appropriately subjected to scrutiny by experts from the relevant scientific community.

> In effect, *Frye* envisions an evolutionary process leading to the admissibility of scientific evidence. A novel technique must pass through an "experimental" stage in

> which it is scrutinized by the scientific community. Only after the technique has been tested successfully in this stage and has passed into the "demonstrable" stage will it receive judicial recognition.

Paul C. Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half-Century Later*, 80 Colum. L. Rev. 1197, 1205 (1980).

The *Frye* test is not without critics. Many believe the test precludes the use of a new discovery or scientific technique even though there may be direct experimental or clinical support for the principle. A leading commentator writes that the objectives of the *Frye* test can be attained satisfactorily by less drastic constraints on the admissibility of scientific evidence. See 1 McCormick on Evidence § 203 (John W. Strong 4th ed. 1992).

In the 1993 decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, ____ U.S. ____, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), the Supreme Court rejected *Frye*'s general acceptance test as the exclusive test and redefined the standard for the admission of expert testimony in the federal courts. The Supreme Court determined that the *Frye* test was superseded by Fed. R. Evid. 702. Rule 702 allows the admission of expert testimony if the scientific or specialized knowledge will assist the trier of fact and if the witness is properly qualified as an expert. The rule specifically states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

The Court explained that "a rigid 'general acceptance' requirement would be at odds with the 'liberal thrust' of the Federal Rules and their 'general approach of relaxing the traditional barriers to "opinion" testimony.' " 113 S. Ct. at 2794 (quoting *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 109 S. Ct. 439, 102 L. Ed. 2d 445 (1988)).

Daubert, by its own terms, does not apply to state court proceedings; nevertheless, the State argues that the *Daubert* holding is persuasive in Nebraska based on the fact that our rules of evidence mirror the federal rules. Nebraska codified the

Federal Rules of Evidence effective August 24, 1975. Since the adoption of the federal rules, we have reaffirmed the *Frye* test as the appropriate legal standard in determining whether to admit new scientific evidence. See, *State v. Houser*, 241 Neb. 525, 490 N.W.2d 168 (1992); *State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (1990).

In our consideration of whether to adopt the *Daubert* standard, we have acknowledged the problems involved in the application of *Frye*, such as identifying the relevant scientific community and the ambiguity about what constitutes "general acceptance"; however, we also recognized that in application, *Daubert* leaves many similar questions unanswered. In refusing to apply *Daubert* in determining the admissibility of DNA evidence, the Arizona Supreme Court reasoned:

> *Daubert* itself does *not* establish a regime based solely on the qualification of experts and relevance. *See* Fed.R.Evid. 702. The *Daubert* analysis includes a reliability requirement for "[p]ertinent evidence based on scientifically valid principles." . . . The nature of this requirement is currently unknown, may vary from case to case, and is to be fashioned by trial judges using an analytical framework as yet unspecified.

(Citation omitted.) *State v. Bible*, 175 Ariz. 549, 580, 858 P.2d 1152, 1183 (1993).

Many jurisdictions which have considered this issue have also refused to abandon the *Frye* standard and will not admit scientific evidence which is still the subject of dispute and controversy in the relevant scientific communities. See, *State v. Cauthron*, 120 Wash. 2d 879, 846 P.2d 502 (1993); *Fishback v. People*, 851 P.2d 884 (Colo. 1993); *State v. Vandebogart*, 136 N.H. 365, 616 A.2d 483 (1992). This caution is warranted in light of the fact that scientific evidence is becoming increasingly more prevalent and prominent in criminal court proceedings.

As one commentator noted, " 'legal proof of criminal conduct is rapidly evolving into a multidisciplinary mosaic of law, science, and technology.' " Andre A. Moenssens, *Foreword: Novel Scientific Evidence in Criminal Cases: Some Words of Caution*, 84 J. Crim. L. & Criminology 1 (1993). Since it is not possible for the courts to ignore these advances,

scientific evidence becomes " 'a source of particular judicial caution.' " *State v. Bible*, 175 Ariz. at 578, 858 P.2d at 1181. A New Mexico court, when faced with this issue, declined to adopt the more lenient relevancy standard of *Daubert* and reaffirmed the *Frye* standard, stating:

> If a scientific principle has gained general acceptance in the scientific community, there is some assurance that the jury will not embroil itself in the question of the validity of the principle. Further, the jury's inclination to be awed by the principle will not be as problematic if scientists generally accept it.
>
> In effect, then, the *Frye* process endorses the soundness of the scientific principle that is at the root of the evidence, and the jury is not required to pass on the scientific reliability of the process involved.

State v. Anderson, 115 N.M. 433, 853 P.2d 135, 138 (N.M. App. 1993). See, also, *State v. Bible*, 175 Ariz. at 578, 858 P.2d at 1181 (applying the *Frye* test: "[B]ecause neither judge nor jury may be able to separate 'junk science' from good science, *Frye* helps guarantee 'that reliability will be assessed by those in the best position to do so: members of the relevant scientific field who can dispassionately study and test the new theory' "); *Fishback v. People*, 851 P.2d at 890 (DNA testing "is precisely the sort of scientific evidence which requires application of the *Frye* test"); *U.S. v. Porter*, 618 A.2d 629, 633 (D.C. 1992) (admissibility of DNA evidence "presents the very kind of issue which the . . . language from *Frye* was designed to address").

In ensuring that only accepted, accurate DNA tests are considered as evidence in trials, we reaffirmed *Frye* as the appropriate test in *State v. Houser*, 241 Neb. 525, 490 N.W.2d 168 (1992), and further instructed that *Frye* was not totally controlling as to the admissibility of DNA evidence, but is only the first of several criteria that a trial court determines are satisfied before such testimony may be admitted.

In the present case, as in *Houser*, we recognize the complex nature of DNA evidence and the need to protect against unproven and potentially erroneous and misleading evidence, and we decline to adopt the less demanding *Daubert* standard and reaffirm *Frye* as the standard for determining the

admissibility of DNA evidence.

In *Houser*, we held that even though the DNA method at issue may satisfy *Frye* as being generally accepted as reliable in the general sense, the forensic applications must also be sufficiently reliable. We instructed that the trial court is to decide preliminarily, outside the presence of the jury, on the basis of the evidence before it: (1) whether the witnesses on the DNA issue are experts in the relevant scientific fields, (2) whether DNA testing used in the case under consideration is generally accepted by the relevant scientific communities, (3) whether the method of testing used in the case under consideration is generally accepted as reliable if performed properly, (4) whether the test conducted properly followed the method, (5) whether PCR DNA analysis evidence is more probative than prejudicial under § 27-403, and (6) whether statistical probability evidence interpreting PCR analysis results is more probative than prejudicial. See *State v. Houser*, 241 Neb. 525, 490 N.W.2d 168 (1992) (applying same standard to RFLP DNA evidence).

Such a procedure was followed here. However, because we determine that FSA's statistical evidence and analysis were flawed and base our decision to reverse on that determination, we can assume without deciding that the methodology and procedure employed by FSA in arriving at a preliminary match were performed by an expert in the field, that the testing done was generally accepted in the scientific community, and that proper protocol was followed, thereby meeting the standards of the *Frye* test. We therefore move on to the statistical analysis.

It is the statistical step in the DNA analysis that is at the heart of this appeal and has been the primary focus of judicial inquiry in recent appellate cases. There is no disagreement that the Hardy-Weinberg principle upon which FSA's probability calculations are based is theoretically sound. See *State v. Houser, supra*. However, as the Washington Supreme Court noted: " '[T]here seems to be a serious misperception that Hardy-Weinberg equilibrium is a law of physics that *must* apply to a population.' . . . The [proponent of DNA evidence] must show more than the theory. For the evidence to be admitted, the [principle] must be valid in application." (Citation omitted.)

State v. Cauthron, 120 Wash. 2d 879, 904, 846 P.2d 502, 514-15 (1993).

It is the question of whether the Hardy-Weinberg equation is valid as applied to population frequency estimates that is at the center of a current dispute within the scientific community. As we previously discussed, in order to calculate the statistical significance of a DNA match, it is necessary to know how frequently in the population an allele will be found. The probability estimate is determined by multiplying the product of the frequencies of the two alleles by two. Although this calculation appears relatively simple, this methodology is under considerable attack by the scientific community. The court in *People v. Pizarro*, 10 Cal. App. 4th 57, 12 Cal. Rptr. 2d 436, 452 (1992), effectively and efficiently summarized the basis of the current dispute in the scientific community:

> In order to calculate the statistical significance of the match within a particular racial or ethnic population, tests are performed to determine the frequency of appearance of the different [alleles] within the target population. Thus, a database would be created by selecting a number of people from the relevant population which would be, theoretically, the same population to which the suspect belonged. Therefore, if the suspect was Hispanic then the Hispanic database would be employed to establish a frequency of occurrence of a given [genotype] within the Hispanic population. The underlying theory behind all of this is that the ratio of [genotypes] will vary among different racial and ethnic groups. In other words, while a [genotype] compared to the perpetrator without regard to race or ethnic background. . . . [T]he dispute revolves around the question of whether or not a racial or ethnic
>
> It is around this theory that controversy rages. A database created from the general population would show the frequency of occurrence of a given defendant's specific [genotype] compared to the perpetrator without regard to race or ethnic background . . . . [T]he dispute revolves around the question of whether or not a racial or ethnic population group chosen to represent the database accurately reflects the group within which the suspect

> should be placed. The literature reflects that a number of prominent scientific figures conclude that selection of the database for a specific ethnic/racial group (the Black population or the Hispanic population, etc.) fails to consider the concept of subgrouping. Generally speaking, the selection of a database from a general population group (Black) as opposed to a subgroup (Blacks of Nigerian descent, for illustration purposes) is predicated on a concept of random mating within the general group without regard to the religion, ethnicity and geography. This process of random mating in general would conclude that the specific population is in . . . equilibrium. The concept of subgrouping assumes that within each ethnic/racial population group there are subgroups that tend to mate within the specific subgroup (mating endogamously) based upon such factors as religion or like ethnicity or geographical differences, etc. Subgrouping would assume that based upon actual mating practices, as opposed to general mating practices, genetic differences would develop between subgroups. Therefore, subgroups (Puerto Rican Hispanics, for example) within a general population (Hispanic, for example) would show significant differences in the frequency of a given allele pattern . . . .

The data used to create the data base in the present case apparently came from an article published in the American Journal of Human Genetics, an HLA workshop, and FSA case work. Thomas Blake, a forensic serologist employed by FSA, testified that numerous data bases exist and that once a determination is made that the data bases have basically the same frequencies, the data from all the different studies can be combined. He stated, "assuming a random mating population," the Hardy-Weinberg equation can be used to check the reliability of the data base.

When asked about the possibility of population substructure, Blake testified that population substructure was rare and not occurring in the population as a whole. When asked if there was a dispute in the scientific community concerning population substructure, Blake stated, "The theory

of population substructure, there's some scientists who agree and some who don't. Nobody really disagrees that there's such a thing as substructure. There certainly is. The question is whether or not in the broad Caucasian population within the United States there are inbreeding isolates."

The State contends that any controversy concerning the statistical probabilities of a declared DNA match concerns credibility and weight, not admissibility. Although in *Houser*, we discussed statistical issues, we did not specifically address whether the admissibility of DNA statistical evidence requires that the probability calculations be based on generally accepted methods. Therefore, the issue now before this court is whether the *Frye-Houser* requirement of general scientific acceptance applies to the statistical probability calculation step of DNA analysis.

In *People v. Barney*, 8 Cal. App. 4th 798, 10 Cal. Rptr. 2d 731 (1992), a California court recently examined this issue. In applying standards essentially identical to *Frye-Houser*, the court reasoned:

> To end the *Kelly-Frye* inquiry at the matching step, and leave it to jurors to assess the current scientific debate on statistical calculation as a matter of weight rather than admissibility, would stand *Kelly-Frye* on its head. We would be asking jurors to do what judges carefully avoid—decide the substantive merits of competing scientific opinion as to the reliability of the novel method of scientific proof. We cannot reasonably ask the average juror to decide such arcane questions as whether genetic substructuring . . . preclude[s] use of the Hardy-Weinberg equation . . . when we ourselves have struggled to grasp these concepts. The result would be predictable. The jury would simply skip to the bottom line—the only aspect of the process that is readily understood—and look at the ultimate expression of match probability, without competently assessing the reliability of the process by which the laboratory got to the bottom line. This is an instance in which the method of scientific proof is so impenetrable that it would " '. . . assume a posture of mystic infallibility in the eyes of a jury . . . .' . . ." . . . It is

> the task of scientists—not judges, and not jurors—to assess reliability. " 'The requirement of general acceptance in the scientific community assures that those most qualified to assess the general validity of a scientific method will have the determinative voice . . . .' " . . .
>
> Might the statistical calculation step be distinguished from the processing and matching steps for *Kelly-Frye* purposes on the ground that only the first two steps produce novel scientific evidence while the third step is merely interpretative? Again, such an approach would subvert *Kelly-Frye*. The evidence produced by DNA analysis is not merely . . . raw data . . . but encompasses the ultimate expression of the statistical significance of a match, in the same way that polygraph evidence is not merely the raw data produced by a polygraph machine but encompasses the operator's ultimate expression of opinion whether the subject is telling the truth. Were we to terminate the *Kelly-Frye* inquiry short of the interpretative steps in new methods of scientific proof, *Kelly-Frye* would lose much of its efficacy as a tool of "considerable judicial caution" and of an "essentially conservative nature" that is "deliberately intended to interpose a substantial obstacle to the unrestrained admission of evidence based upon new scientific principles."

(Citations omitted.) (Emphasis omitted.) 10 Cal. Rptr. 2d at 742. Accord *State v. Anderson*, 115 N.M. 433, 853 P.2d 135 (N.M. App. 1993).

We agree. The calculation of statistical probability is an essential part of the process used in determining the significance of a DNA match; therefore, the underlying method of arriving at that calculation must also meet the *Frye-Houser* general acceptance test. Based on this conclusion, the task before this court is not to decide the underlying *validity* of the methods employed in calculating population frequencies—whether or not Hardy-Weinberg equations are invalid due to population substructure—rather, we must determine whether the methodology has gained general acceptance. The report of the Committee on DNA Technology

in Forensic Science, National Research Council, *DNA Technology in Forensic Science* (1992), a part of the record in the *Frye* hearing held in this case, is persuasive regarding the lack of general acceptance. As stated in *State v. Anderson*, 853 P.2d at 145-46:

> While this case was pending on appeal, a group of scholars that are part of the National Academy of Sciences released a prepublication manuscript of a report on DNA evidence. *See* Committee on DNA Technology in Forensic Science, National Research Council, *DNA Technology in Forensic Science* (forthcoming). The group of scholars included many highly regarded names in science, medicine, and law. The bulk of the report urges the continued development of DNA evidence for forensic use. However, the report does include some criticisms of current methods of DNA typing. Again, the authors focus on one of the main criticisms, the absence of reliable subpopulation databases. *Id.* at § 3.2. The report discusses the debates over the need for subpopulation databases, and concludes that they indeed are necessary. This report is indicative of the absence of general acceptance. There is not just one author trying to make a point, but rather a group of people that has reached a consensus in rejecting one aspect of the current methods of forensic use of DNA evidence.

Before the issuance of the DNA committee report, statistical estimates calculated by forensic laboratories were routinely ruled admissible in most cases; however, since the issuance, an overwhelming majority of courts have excluded evidence of a match after finding there is no general acceptance as to the statistical probability calculations due to the division in the scientific community on the issue of population substructure. See, *State v. Vandebogart*, 136 N.H. 365, 616 A.2d 483 (1992) (evidence of match was not admissible when not accompanied by scientifically reliable population frequency estimate); *Commonwealth v. Lanigan*, 413 Mass. 154, 162, 596 N.E.2d 311, 316 (1992) (court held there was no general acceptance in the field of population genetics when there exists a "lively, and still very current, dispute" regarding the role of population

substructure); *People v. Mohit*, 153 Misc. 2d 22, 579 N.Y.S.2d 990, 998 (1992) (there is a "sharp disagreement within the scientific community on the manner in which probability estimates are derived").

The State contends that the following appellate court decisions are indicative of the general acceptance of PCR DQ Alpha methodology: *Spencer v. Com.*, 240 Va. 78, 393 S.E.2d 609 (1990); *Clarke v. State*, 813 S.W.2d 654 (Tex. App. 1991); *State v. Williams*, 252 N.J. Super. 369, 599 A.2d 960 (1991); *State v. Lyons*, 124 Or. App. 598, 863 P.2d 1303 (1993); and *State v. Penton*, No. 9-91-25, 1993 WL 102507 (Ohio App. Apr. 7, 1993) (unpublished opinion), *dismissed* 67 Ohio St. 3d 1464, 619 N.E.2d 698. An examination of these cases reveals that the issues of population substructure and the reliability of population data bases were not addressed; therefore, these cases are not persuasive nor relevant as to validity of the statistical methodology employed by FSA. See, *U.S. v. Chischilly*, 30 F.3d 1144, 1157 (9th Cir. 1994) ("[u]nderrepresentation of persons of like ethnicity in the profile data bases and questionable assumptions of allelic independence may inflate the odds against a random match with the defendant's sample. In such a situation the jury may be ill-suited to discount properly the probative value of DNA profiling statistics"); *State v. Hummert*, No. 1 CA-CR 92-098, 1994 WL 384979 at *7 (Ariz. App. July 26, 1994)) (" '[t]estimony of a match in DNA samples, without the statistical background or probability estimates, is neither based on a generally accepted scientific theory nor helpful to the trier of fact' ").

Given the substantial disagreement within the scientific community, this court finds there is no general acceptance of FSA's statistical probability calculations. This finding requires an additional inquiry into whether the absence of general acceptance of the statistical methodology results in the total exclusion of the evidence.

Two judicial approaches have emerged. One approach is to separate the evidence of a declared match from the statistical probability component of the DNA analysis. See, *State v. Pennell*, 584 A.2d 513 (Del. 1989); *State v. Schwartz*, 447

N.W.2d 422 (Minn. 1989). Under this approach, the jury is not allowed to hear evidence of the statistical significance of the match. The majority of courts have rejected this approach and have adopted the view expressed by the DNA committee. The DNA committee report states: "To say that two patterns match, without providing any scientifically valid estimate . . . of the frequency with which such matches might occur by chance, is meaningless." *DNA Technology in Forensic Science, supra* at 3-1.

"Without the probability assessment, the jury does not know what to make of the fact that the patterns match: the jury does not know whether the patterns are as common as pictures with two eyes, or as unique as the Mona Lisa." *U.S. v. Yee*, 134 F.R.D. 161, 181 (N.D. Ohio 1991). The court in *People v. Barney*, 8 Cal. App. 4th 798, 10 Cal. Rptr. 2d 731 (1992), found that a declared DNA match means nothing without the statistical component. Similarly, the Washington Supreme Court found that "[t]estimony of a match in DNA samples, without the statistical background or probability estimates, is neither based on a generally accepted scientific theory nor helpful to the trier of fact." *State v. Cauthron*, 120 Wash. 2d 879, 907, 846 P.2d 502, 516 (1993). See, also, *State v. Anderson*, 115 N.M. 433, 853 P.2d 135 (N.M. App. 1993); *State v. Vandebogart, supra*; *Commonwealth v. Curnin*, 409 Mass. 218, 565 N.E.2d 440 (1991).

The majority approach is consistent with this court's opinion in *State v. Houser*, 241 Neb. 525, 490 N.W.2d 168 (1992). Therefore, we hold that evidence of a DNA match will not be admissible if it has not been accompanied by statistical probability evidence that has been calculated from a generally accepted method. Even though the trial court could not have anticipated the extent of the current dispute within the scientific community regarding population substructure, it was error to admit the DNA evidence. Whether this is harmless error, as the State contends, will be discussed *infra*.

WHETHER PCR DNA ANALYSIS AND STATISTICAL EVIDENCE IS MORE PROBATIVE THAN PREJUDICIAL UNDER § 27-403

Although evidence may be relevant, § 27-403 provides that it

may be excluded if the evidence is more prejudicial than probative. Having concluded that the statistical process is an integral component of DNA testing, we examine whether the PCR DQ Alpha analysis and statistical evidence are more probative than prejudicial. We begin by noting that unlike the RFLP typing system at issue in *Houser*, the PCR system's statistical probability results are not expressed in the exceptionally high numbers that essentially "fingerprint" the defendant. Similar to ABO blood typing, PCR results indicate that the defendant falls within a certain percentage of a reference population group with the same genotype as that detected in the evidence sample. Although at first glance, this result may appear rather innocuous, a more searching examination reveals an inherent problem associated with how the statistical probabilities are applied.

In *People v. Pizarro*, 10 Cal. App. 4th 57, 12 Cal. Rptr. 2d 436 (1992), the court noted that under circumstances where the racial or ethnic background of the suspect is unknown, relevancy issues may be raised regarding the use of racial and ethnic data bases. The court reasoned:

> The disputed fact generally is whether the suspect is also the perpetrator. Thus, the evidence is relevant if it tends to prove the suspect is the perpetrator. However, the preliminary fact upon which the relevancy of the proffered evidence depends is the racial/ethnic background of the *perpetrator*, not the suspect. If the only way you can conclude the perpetrator fits a racial/ethnic category is to assume the perpetrator was the same race/ethnic background as the suspect then the reasoning is circular, i.e.: proof of the racial/ethnic background of the perpetrator depends on the racial/ethnic background of the suspect from which we infer a statistical probability that the perpetrator is the suspect. Absent proof . . . to support the preliminary fact as to the racial/ethnic background of the perpetrator, we see no relevancy to a database selected because of the racial/ethnic background of the suspect/defendant. The problems created by employing assumed relevancy of the database are insidious. A jury hears [a statistical] figure that not

> uncommonly depends for its relevance upon the very issue that they have to decide: is the defendant the perpetrator?

12 Cal. Rptr. 2d at 460.

The problems discussed by the *Pizarro* court are evident in the present case. Portions of the testimony of Blake, FSA's forensic serologist, at the preliminary hearing illustrate the problem and are set forth as follows:

> Q. Okay. In your — now, let's talk specifically about your analysis of Asa Carter's case, all right? You talk about — your results indicate he is a 4,4?
>
> A. Yes.
>
> Q. And then make — draw some conclusions about what percentage of certain racial backgrounds have with — have a 4,4 present in their DQ Alpha, correct?
>
> A. Well, that's an independent exercise, but that information was provided, yes.
>
> Q. All right. First of all, my understanding from yesterday's testimony and from the depositions was that obviously you cannot tell the racial identity of an individual from the — well, specifically in this case, from any type of observation or analysis of the sperm, correct?
>
> A. That is correct.
>
> . . . .
>
> Q. With regard to — specifically with regard to the defendant, were you given information as to his racial background?
>
> A. I think I had the understanding that he was black.
>
> . . . .
>
> Q. Well, if Mr. Carter's racial background is, for instance, part black, part American Indian and part white, how does that affect your percentages, or does it?
>
> A. It has absolutely no effect. Mr. Carter's particular racial background is totally irrelevant.
>
> . . . .
>
> Q. Particularities of the racial makeup of the defendant have no bearing on whether he would or would not fit within a certain racial data base upon which you say eight percent or ten percent?
>
> A. Not unless you have some independent information

that the true assailant comes from a particular race. Again, the only point in giving you this information — as far as I know, nobody knows anything about the race of the assailant in this case.

So the purpose of giving you, as I did in my report, data for blacks and Caucasians is simply based upon the idea, maybe it reflects my own bias, that most people, in at least my community and, I assume, in this community, are either black or white. So you might want to know what is the extreme for the black population, which is the extreme for the Caucasian population? And that helps you answer how common this type is in the man walking down the street, somewhere between 8 and 11 percent.

Blake further testified that based on the combined data base used by FSA, the defendant's genotype (4,4) occurs in about 8 percent of the Caucasian population, slightly more than 10 percent of the black population, 16.5 percent of the Mexican-American population, and 13.7 percent of the Sioux Native American population. However, Blake's written report and the testimony of Mihalovich at trial referred to only the Caucasian and black statistical percentages.

As previously discussed and as Blake's testimony illustrates, all population groups share common PCR DQ Alpha genotypes. It is only the frequency with which these genotypes appear within the different racial or ethnic groups which varies. Since Blake concedes that an individual's race or ethnic background cannot be determined by his or her genotype, the logic of presenting limited statistical frequencies when the racial or ethnic background of the perpetrator is unknown is flawed. There is nothing in this method that accounts for the possibility that the perpetrator was of another racial or ethnic group such as Hispanic, Native American, or Asian. It is apparent that the statistical frequency evidence the jury heard in the present case was based on the assumption that the perpetrator was either black or Caucasian. To limit the statistical frequency evidence to two racial groups when the racial or ethnic background of the perpetrator is unknown is prejudicial under any circumstances; however, in the present case it was particularly offensive in light of the fact the defendant is a black man and his Caucasian

friends (Hicks and Harpster) were excluded as possible suspects by PCR DNA tests. See, also, *State v. Anderson*, 115 N.M. 433, 853 P.2d 135, 147 (N.M. App. 1993) (court noted that the data base chosen depends on the ethnicity of the defendant and not necessarily the ethnicity of the perpetrator of the crime. It concluded that this method was misleading, because "[i]f, in fact, the crime was committed by someone of a different racial or ethnic database, then the appropriate subgroup, and thus the odds, would change, perhaps dramatically"); *People v. Pizarro*, 10 Cal. App. 4th 57, 12 Cal. Rptr. 2d 436, 459 (1992) (it is a "bootstrap argument" to assume relevancy of a data base simply because the suspect falls within that racial or ethnic group); R.C. Lewontin, Letter, *Which Population?*, 52 Am. J. Hum. Genetics 205 (1993) (the relevant question is not the ethnicity of the defendant).

Considering the nature of the statistical probability evidence admitted in this case, we determine whether it is more prejudicial than probative. The State concedes that the reasons the PCR DNA tests were offered were to (1) bolster the defendant's wife's testimony which identifies the defendant as the perpetrator and (2) to substantiate the theory that the victim was sexually assaulted. These reasons appear to have little probative value. The fact that the victim was sexually assaulted was clearly established and was not an issue in this case. Furthermore, the testimony of the defendant's wife was substantiated by strong circumstantial evidence. The limited probative value of the DNA evidence, in conjunction with the questionable use of the Negroid and Caucasian data bases in this case, renders the DNA evidence more prejudicial than probative.

HARMLESS ERROR

The question remains whether the error in admitting the DNA evidence absent compliance with *Frye-Houser* was harmless error. In a jury trial of a criminal case, whether an error in admitting or excluding evidence reaches a constitutional dimension or not, an erroneous evidential ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt. *State v.*

Dyer, 245 Neb. 385, 513 N.W.2d 316 (1994); *State v. Flores*, 245 Neb. 179, 512 N.W.2d 128 (1994). An error is harmless when the improper admission did not materially influence the jury to reach a verdict adverse to the substantial rights of the defendant. *State v. Hughes*, 244 Neb. 810, 510 N.W.2d 33 (1993).

The U.S. Supreme Court, in *Sullivan v. Louisiana*, ____ U.S. ____, 113 S. Ct. 2078, 2081, 124 L. Ed. 2d 182 (1993), addressed the issue of harmless error and stated:

> Harmless-error review looks . . . to the basis on which "the jury actually rested its verdict." . . . The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error.

(Emphasis omitted.) (Citation omitted.)

Therefore, it is harmless error only if the appellate court is convinced beyond a reasonable doubt that the erroneous admission of DNA evidence could have had no influence on the jury's judgment.

We begin our analysis by noting that this case is atypical in that the defendant did not present any DNA expert to contest or question the procedures or findings of the prosecution's DNA witnesses. In nearly all the reported cases involving DNA, the trier of fact and the appellate court have been provided with the testimony of at least several expert witnesses, both in support of and in opposition to the admission of the DNA evidence. See, e.g., *State v. Cauthron*, 120 Wash. 2d 879, 846 P.2d 502 (1993); *State v. Vandebogart*, 136 N.H. 365, 616 A.2d 483 (1992); *U.S. v. Yee*, 134 F.R.D. 161 (N.D. Ohio 1991).

The State presented strong circumstantial evidence against the defendant. However, in *State v. Houser*, 241 Neb. 525, 546, 490 N.W.2d 168, 182 (1992), we held that even though other evidence was sufficient to support the defendant's conviction, the error in admitting the DNA evidence was not harmless because jurors could be unduly influenced by DNA evidence. The Mississippi Supreme Court, in *Polk v. State*, 612 So. 2d 381, 393 (Miss. 1992), recognized the potency of DNA evidence with regard to its possible effect on jurors, saying, "Because of

the potential for jurors to rely solely on the evidence provided by DNA to the exclusion of other evidence, it is important . . . ."

The erroneous admission of DNA evidence cannot be said to be harmless error given the highly prejudicial nature of DNA evidence and the unusual circumstances of this case. See *State v. Houser, supra.*

The judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

WRIGHT, J., dissenting.

I respectfully dissent from the decision of the majority, which grants Asa T. Carter a new trial. The following is a brief summary of the evidence upon which the conviction was obtained: On October 20, 1990, the victim, a 9-year-old girl, was found dead in an area immediately to the rear of the apartment house in Omaha in which Carter resided. Carter's wife testified that the victim arrived to stay overnight at the Carters' home on the evening of October 19. During the evening, Carter, Lanny Hicks, and David Harpster periodically came and went from the apartment. At no time did Hicks or Harpster have any contact with the victim, and eventually they left.

At 4:15 a.m. on October 20, Carter entered the bedroom, became sexually aroused, and told his wife he wanted to "make love" to her, but then told his wife he wanted to make love to the victim, who was sleeping in the same bed. Carter told his wife that if she loved or cared about him, she would let him make love to the victim, so his wife left the apartment.

When Carter's wife returned approximately 40 minutes later, she found the victim lying naked faceup on the bed, with no pulse. Carter told his wife, "I didn't mess with her." He then threatened his wife, told her she must "stick by his side" or the "same thing could happen to [her]," and indicated that "if he [went] down," he would take her "down with him." Carter then dressed the victim, removed the body from the apartment, and put the bedsheets into the bathtub.

Medical evidence established that the victim had been subjected to anal and vaginal penetration and that the cause of death was asphyxiation, most likely caused by compression of

her chest by the perpetrator of the sexual assault. Semen was present in the crotch and back area of the victim's underwear and on an anal swab taken from the victim. Human blood was found on vaginal and anal swabs, a washcloth, a towel, a shirt, bedsheets, and Carter's jacket pocket.

As I understand it, the testing conducted in this case, polymerase chain reaction DNA amplification (PCR DQ Alpha DNA) typing, had two separate components. First, semen taken from the anal swab was tested for the presence or absence of certain PCR genotypes, and similar tests for PCR genotypes were completed on samples taken from the victim, Carter, Hicks, and Harpster. The results were compared directly. Without any statistical analysis whatsoever, the lack of certain PCR genotypes eliminated Hicks and Harpster as possible donors of the semen. Conversely, Carter could not be eliminated because of the presence of certain PCR genotypes. The majority concedes that the methodology up to this point meets the *Frye-Houser* standard.

The second step in the PCR analysis becomes significant. That step is the statistical analysis of the raw data from the tests. The majority holds that this statistical analysis of the raw data, the statistical analysis which identified Carter as a possible donor of the semen, did not meet the *Frye-Houser* standard. The majority places emphasis on the statistical calculation which ties Carter to the donor of the semen. Because the majority believes the calculation of statistical probability is an essential part of the process used to determine the significance of a DNA match, it concludes that inclusion of the DNA tests in evidence was prejudicially erroneous.

In my opinion, statistical probability evidence is not required for the admission of the PCR test in this case. Restriction fragment length polymorphism (RFLP) DNA analysis, which was used in *State v. Houser*, 241 Neb. 525, 490 N.W.2d 168 (1992), declares a specific "fingerprint" match. The PCR test used in this case does not identify the donor, but merely determines whether a particular person can be eliminated as a donor. Whether or not statistical evidence is later used to correlate the exclusions established by the test to particular population groups, the exclusions made by the test stand—they

are independent of the statistical analysis.

If Carter had been an unknown suspect in a general population, the statistical correlation would have been critical in identifying him as a possible donor of the semen. Logically, in a case involving an unknown number of suspects, evidence of the number of people who had similar DNA patterns and the possible frequency of such similar DNA patterns among samples taken from a given population would be extremely important in identifying the perpetrator. However, Carter's identity as the probable perpetrator was established by the testimony of his wife, which placed him in bed with the victim and sexually aroused no more than 40 minutes before the victim's death. Disregarding statistical analysis, the PCR test tended to show no more and no less than the fact that Carter could not be ruled out. In other words, the PCR test showed that it was not impossible for Carter to be the donor.

The testimony of Carter's wife established a particular chain of events. When Carter's wife left the apartment, the victim was alive and healthy. Forty minutes later, the victim had been sexually assaulted anally and vaginally and had died from suffocation. Carter told his wife he was going to sexually assault the victim, and when his wife returned, Carter threatened that harm would come to her if she did not remain silent about the death. He then disposed of the body and attempted to destroy other evidence. The raw data from the PCR test showed that this chain of events was not scientifically impossible.

In addition to the testimony of Carter's wife, the jury heard testimony from Carter's two daughters from a previous marriage and his half sister, who testified that they had been sexually assaulted by Carter when they were between the ages of 6 and 11. The testimony established that Carter had a history of sexually assaulting young girls.

Even assuming that the statistical probability evidence in this case was erroneously admitted, it can be said beyond a reasonable doubt that its admission was harmless. It is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless. *State v. Timmerman*, 240 Neb. 74, 480 N.W.2d 411 (1992). In the trial of a criminal case,

erroneous admission of evidence which is not cumulative may constitute harmless error beyond a reasonable doubt, when a defendant's conviction is supported by overwhelming evidence which has been properly admitted or admitted without objection. *State v. Nielsen*, 243 Neb. 202, 498 N.W.2d 527 (1993). An error is harmless when the improper admission of evidence did not materially influence the jury to reach a verdict adverse to the substantial rights of the defendant. *State v. Hughes*, 244 Neb. 810, 510 N.W.2d 33 (1993). It may be said beyond a reasonable doubt that the jury did not rest its verdict upon evidence that Carter's genotype was found in 7 percent of the white population and 10 percent of the black population.

There were three male suspects who had access to the victim. Two of those three were eliminated without the use of statistical analysis. Where there is a known group of three possibilities and two are eliminated, statistical probabilities concerning the third possibility are unnecessary. The evidence of Carter's guilt is overwhelming. I cannot say that the statistical probability evidence regarding the DNA pattern materially influenced the jury. I would affirm the conviction.

HASTINGS, C.J., joins in this dissent.

GEORGE DALITION ET AL., APPELLANTS, V. LEON E. LANGEMEIER AND ROCK COUNTY LAND CO., A NEBRASKA PARTNERSHIP, APPELLEES.

524 N.W.2d 336

Filed December 2, 1994. No. S-93-860.

1. **Demurrer: Pleadings.** In considering a demurrer, a court must assume that the pleaded facts, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of facts not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial.
2. **Rules of the Supreme Court: Records.** Neb. Ct. R. of Prac. 5F(1) (rev. 1992) and Neb. Ct. R. of Official Ct. Rptrs. 19f(1) (rev. 1992) require that a bill of exceptions recite at the appropriate pages of the body thereof the marking and

offering of an exhibit and the ruling made thereon.

3. **Actions: Judicial Notice: Demurrer: Pleadings.** While in ruling on a demurrer a court may take judicial notice of its own record in an interwoven and interdependent action it previously adjudicated, a demurrer otherwise goes only to those defects in pleading which appear on the face of the petition and those documents attached to and made a part of it.
4. **Limitations of Actions: Pleadings: Demurrer.** A petition which makes apparent on its face that the cause of action it asserts is ostensibly barred by the statute of limitations fails to state a cause of action is demurrable unless the petition alleges some excuse which tolls the operation and bar of the statute.
5. **Statutes: Limitations of Actions: Service of Process.** The tolling statute, Neb. Rev. Stat. § 25-214 (Reissue 1989), does not suspend the statute of limitations when one is absent from the state but nonetheless remains amenable to the service of personal process.
6. **Statutes: Legislature: Presumptions: Judicial Construction.** When the Legislature enacts a law affecting an area which is already the subject of other statutes, it is presumed that it did so with full knowledge of the preexisting legislation and the decisions of the Supreme Court construing and applying that legislation.
7. **Demurrer: Pleadings.** When a demurrer to a petition is sustained, a court must grant leave to amend the petition unless it is clear that no reasonable possibility exists that amendments will correct the defect.

Appeal from the District Court for Douglas County: MICHAEL MCGILL, Judge. Affirmed.

Bruce H. Brodkey, of Brodkey & Cuddigan, and William T. Brooks, of Brooks & Hess, for appellants.

Michael L. Schleich and Roger L. Shiffermiller, of Fraser, Stryker, Vaughn, Meusey, Olson, Boyer & Bloch, P.C., for appellees.

HASTINGS, C.J., WHITE, CAPORALE, LANPHIER, and WRIGHT, JJ., and BOSLAUGH, J., Retired.

CAPORALE, J.

I. STATEMENT OF CASE

Plaintiffs-appellants, George Dalition, W. Roger Curry, and Janette Maskell, allege that the defendants-appellees, Leon E. Langemeier and Rock County Land Co., a Nebraska partnership, breached the parties' contract, failed to render an accounting, and perpetrated a constructive fraud. The defendants demurred on grounds which include the claim that the suit is time barred. Concluding that the long-arm statutes,

Neb. Rev. Stat. §§ 25-535 through 25-541 (Reissue 1989), rendered the tolling statute, Neb. Rev. Stat. § 25-214 (Reissue 1989), inapplicable to the circumstances presented, the district court found that the suit was filed out of time. The court therefore sustained the defendants' demurrer and dismissed the petition. Plaintiffs appealed. We granted their motion to bypass the Nebraska Court of Appeals and now affirm the judgment of the district court.

II. SCOPE OF REVIEW

In considering a demurrer, a court must assume that the pleaded facts, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of facts not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial. *First Nat. Bank in Morrill v. Union Ins. Co., ante* p. 636, 522 N.W.2d 168 (1994).

III. FACTS

In addition to being supplied with the petition and other papers filed with the clerk of the district court, we have been provided with a purported bill of exceptions containing several exhibits. It is certified to be "correct and complete" and to contain "all matters required to be included . . . pursuant to . . . the rules of the Supreme Court of the State of Nebraska . . . ." Contrary to that certification, the fact is that the purported bill of exceptions does not comply with our rules.

Among other things, Neb. Ct. R. of Prac. 5F(1) (rev. 1992) and Neb. Ct. R. of Official Ct. Rptrs. 19f(1) (rev. 1992) require that a bill of exceptions contain an index showing not only where exhibits may be found, but where they were marked, offered, and ruled upon. The rules thus require that a bill of exceptions recite at the appropriate pages of the body thereof the marking and offering of an exhibit and the ruling made thereon. Not only does the purported bill of exceptions supplied in this case not contain an index, it tells nothing about how the exhibits got before the district court. Nonetheless, it is apparent from the recitations in the district court's ruling that the exhibits did come to its attention in some fashion and that it

did consider them.

Under other circumstances, such a purported bill of exceptions in and of itself might well doom an appellant's cause. But in this instance, neither the imperfections in the preparation of the bill of exceptions nor the false certification affects the adjudication.

This is so, for while in ruling on a demurrer a court may take judicial notice of its own record in an interwoven and interdependent action it previously adjudicated, *Association of Commonwealth Claimants v. Moylan, ante* p. 88, 517 N.W.2d 94 (1994), a demurrer otherwise goes only to those defects in pleading which appear on the face of the petition, *Pappas v. Sommer*, 240 Neb. 609, 483 N.W.2d 146 (1992), and those documents attached to and made a part of it, *Horton v. Ford Life Ins. Co., ante* p. 171, 518 N.W.2d 88 (1994). Therefore, in considering the exhibits contained in the purported bill of exceptions, the district court erred as did the trial court in *Pappas* when, in ruling on a motion it treated as a demurrer, it considered a bankruptcy court filing which had not been made a part of the *Pappas* petition.

We thus limit ourselves to the facts as alleged in the petition plaintiffs filed on March 31, 1993, and the various documents attached to and made a part of it. It appears therefrom that on December 30, 1980, Langemeier, Dalition, Curry, and Maskell's predecessor in interest entered into a partnership agreement for the purpose of owning and operating agricultural properties and businesses.

Langemeier then assigned to the partnership 2 sections of land in Rock County, Nebraska, which he had purchased a few months earlier. In exchange for the investments made by Dalition and Curry, Maskell's predecessor and Langemeier agreed that upon 90 days' prior notice, they would repurchase the lands from the partnership on or before December 31, 1982.

On September 27, 1982, Dalition and Curry made written demand upon Maskell's predecessor and Langemeier to repurchase the lands. Maskell's predecessor died on October 20, and, in accordance with the partnership agreement, Maskell succeeded as a partner to her predecessor's interest. Langemeier refused to repurchase the lands. (No allegations are made

concerning the role of Maskell's predecessor with respect to the nonrepurchase of the lands, nor are any allegations specifically directed to the partnership's conduct.)

From and after December 1, 1980, Langemeier has acted as the sole officer, manager, operator, and bookkeeper for the partnership and has failed to render to plaintiffs an accounting of the partnership activities, notwithstanding that an accounting was repeatedly sought beginning some time prior to September 27, 1982.

Langemeier also failed to disclose to the others the material facts with regard to his dealings with the partnership and has in a variety of ways acted not in the best interests of the partnership but in his own best interests, which actions include the conversion and appropriation to himself and for his benefit proceeds from the sale of partnership grain. Foreclosure of the mortgages on the lands was commenced on or about June 21, and title in said lands was taken by the mortgagee.

IV. ANALYSIS

Plaintiffs concede that but for the tolling statute, each of their causes would be time barred—the contract cause by no later than December 27, 1987, the accounting cause by no later than March 12, 1988, and the fraud cause by no later than March 12, 1987. Thus, we conduct no independent examination as to when, if the tolling statute does not apply, plaintiffs' causes became time barred.

Plaintiffs also recognize that a petition which makes apparent on its face that the cause of action it asserts is ostensibly barred by the statute of limitations fails to state a cause of action and is demurrable unless the petition alleges some excuse which tolls the operation and bar of the statute. See, *Upah v. Ancona Bros. Co.*, *ante* p. 585, 521 N.W.2d 895 (1994); *Calvert v. Roberts Dairy Co.*, 242 Neb. 664, 496 N.W.2d 491 (1993). Plaintiffs' contention is that the petition alleges an excuse for failing to file the suit within the applicable periods of limitation by averring that Langemeier "was a resident of the State of Nebraska until January, 1985, at which time he departed the State of Nebraska and became, and has since been, a resident of the State of Montana" and that the

partnership is a Nebraska entity which "no longer has an office nor does business in the State of Nebraska." Plaintiffs postulate therefrom that the time elapsing from and after January 1985 is not to be counted, making their March 31, 1993, petition timely as to each of their causes.

Plaintiffs' contention that their suit is not time barred is grounded in the language of the tolling statute, § 25-214:

> If, when a cause of action accrues against a person, he is out of the state, or shall have absconded or concealed himself, the period limited for the commencement of the action shall not begin to run until he comes into the state, or while he is absconded or concealed; and if, after the cause of action accrues, he departs from the state, or absconds or conceals himself, the time of his absence or concealment shall not be computed as any part of the period within which the action must be brought.

However, the district court reasoned that because of the interplay between the tolling statute and the long-arm statutes, plaintiffs' allegations with respect to the departures of Langemeier and the partnership from Nebraska provide no excuse which tolls the operation and bar of the various periods of limitations otherwise applicable to plaintiffs' causes.

The long-arm statutes declare in § 25-537 that when the "exercise of personal jurisdiction is authorized" by other provisions, "service may be made outside this state."

Section 25-536 provides:

> A court may exercise personal jurisdiction over a person:
>
> (1) Who acts directly or by an agent, as to a cause of action arising from the person:
>
> (a) Transacting any business in this state;
>
> . . .
>
> (c) Causing tortious injury by an act or omission in this state;
>
> . . .
>
> (e) Having an interest in, using, or possessing real property in this state . . . [.]

Section 25-535 defines person as including an individual and a partnership.

The longest applicable period of limitations is 5 years. Neb. Rev. Stat. §§ 25-205, 25-207, and 25-212 (Reissue 1989). Thus, by virtue of plaintiffs' concession that if the tolling statute does not apply all of their causes become time barred by no later than March 12, 1988, it necessarily follows that everything they complain about took place prior to 1985 and that the causes of action thus arose by virtue of the transaction of business in this state, by virtue of acts and omissions in this state, or by virtue of having been an interest in real property in the state.

While plaintiffs characterize the issue concerning the meaning of the phrase "shall have absconded or concealed himself" in the tolling statute as one of first impression in this state, such proves not to be the case. The reality is that the issue was first considered by this court almost 120 years ago in *Blodgett v. Utley*, 4 Neb. 25 (1875). Therein, the judgment creditor obtained a foreign judgment but failed to bring an action thereon in this state until after the 5-year period of limitations had expired. At various times during that 5-year period, the debtor had been temporarily absent from Nebraska, but at all times during his absences maintained in Nebraska a usual place of residence where service of personal process could have been had.

Nonetheless, under a tolling statute which in relevant parts then read as does the current such statute, the *Blodgett* trial court concluded that the action was not time barred and entered judgment in favor of the creditor.

In reversing the trial court, this court wrote:

> It is clear that if we are to be governed by the strict literal language of the statute, that the several periods of absence of the [judgment debtor] from the state, must be deducted from the five years and ten months during which he has resided in this state, in which case the action is not barred. Do the words "depart from the state," as used in [the statute], mean a mere temporary absence from the state while the debtor's usual place of residence is here, or are they intended to apply to such an absence from the state as entirely suspends the power of the plaintiff to commence his action? We think it was the intention of the legislature to give the creditor five full years to commence

> his action, and if during that period, the right to proceed in our courts to reduce the claim to judgment is suspended by reason of the absence or concealment of the debtor, the period of *such* absence should not be computed as any part of the time within which an action may be brought. It is one of the grounds for attachment under our code that the debtor "so conceals himself that summons cannot be served upon him," and it is evident that the reason of suspension of the statute of limitations, in case of concealment, is because service of summons cannot be had on the debtor in consequence thereof.

(Emphasis in original.) *Id.* at 29. The *Blodgett* court also reasoned that the tolling statute was designed to protect the rights of a claimant in those cases where it was not practicable for one to enforce one's rights by suit; however, justice and propriety did not require that the court interpret the tolling statute to include periods of time when the debtor "was personally out of the state, but during which the [creditor] might notwithstanding have commenced a personal action" against the debtor. *Id.* at 30.

The *Blodgett* court specifically rejected the creditor's argument that mere absence from the state was sufficient to toll the statute of limitations. Therefore, *Blodgett* teaches that the tolling statute does not suspend the statute of limitations when one is absent from the state but nonetheless remains amenable to the service of personal process.

This court reaffirmed that rule in *Seymour v. Street*, 5 Neb. 85 (1876), citing *Blodgett* for the proposition that absence from the state, as contemplated by the tolling statute, meant that period in which the right to proceed in court and reduce the claim to judgment was suspended. Similarly, *Talcott v. Bennett*, 49 Neb. 569, 68 N.W. 931 (1896), held that concealment or absconding as used within the tolling statute meant such absence from the state as affects the commencement of judicial proceedings in Nebraska. Again, in *Omaha & Florence L. & T. Co. v. Parker*, 33 Neb. 775, 51 N.W. 139 (1892), this court held that in order to suspend the statute of limitations under the tolling statute, it is necessary that the absence from the state be such that it prevents a claimant from bringing an action against

the absent person.

In *Webster v. Citizens Bank of Omaha*, 2 Neb. (Unoff.) 353, 96 N.W. 118 (1902), this court again declared that when considering whether the tolling statute should suspend a statute of limitations, the important practical question was whether one was within reach of process in the state. The *Webster* court noted that the purpose of the tolling statute is to afford the requisite time and facility for the reasonably diligent prosecution of claims.

More recently, in *Gatliff v. Little Audrey's Transportation Co.*, 317 F. Supp. 1117 (D. Neb. 1970), the court, citing *Blodgett v. Utley*, 4 Neb. 25 (1875), held that the statute of limitations was not tolled by the absence from the state of one who at all times following a motor vehicle collision could have been sued in the state through the provisions of a statute which permitted service of process on nonresident motorists through the Secretary of State and the mailing of notice to the out-of-state motorist.

The *Gatliff* court noted that the purpose of statutes of limitations is to bring an end to the uncertainties of litigation within a reasonable time and that the purpose of tolling statutes is to overcome the effects of a wrongdoer's interference with a claimant's ability to enforce his or her rights. The *Gatliff* court therefore reasoned that to permit the absence of one who could have been sued in the state to toll a period of limitations would be to frustrate the very purpose for which statutes of limitations exist.

Nonetheless, plaintiffs argue that if the Legislature had intended for the long-arm statutes to have modified the tolling statute, it would have included in the long-arm statutes language to that effect. However, the argument overlooks the fact that when the long-arm statutes were enacted, 1967 Neb. Laws, ch. 143, §§ 1-7, pp. 439-40, the tolling statute had already been in existence for a century, Rev. Stat. § 20, p. 396 (1867), and its meaning judicially settled for 92 years. The applicable rule is that when the Legislature enacts a law affecting an area which is already the subject of other statutes, it is presumed that it did so with full knowledge of the preexisting legislation and the decisions of the Supreme Court

construing and applying that legislation. *School Dist. No. 17 and Westside Comm. Schools v. State*, 210 Neb. 762, 316 N.W.2d 767 (1982). Therefore, it must be presumed that the Legislature was aware of the judicial decisions concerning the tolling statute when it enacted the long-arm statutes. Had the Legislature intended for one's mere physical absence to toll the limitations period, contrary to prior judicial interpretation, it could have revised the tolling statute to clearly so provide.

Having determined that the tolling statute does not save plaintiffs' petition, we reach the rule that when a demurrer to a petition is sustained, a court must grant leave to amend the petition unless it is clear that no reasonable possibility exists that amendments will correct the defect. *Association of Commonwealth Claimants v. Moylan, ante* p. 88, 517 N.W.2d 94 (1994).

As plaintiffs have conceded that in the absence of applying the tolling statute each of their causes is time barred, amendments cannot correct the defect in their pleading.

V. JUDGMENT

Consequently, as noted in part I, the judgment of the district court is affirmed.

AFFIRMED.

FAHRNBRUCH, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. PHILLIP SECRET, JR., APPELLANT.

524 N.W.2d 551

Filed December 2, 1994. No. S-93-1039.

1. **Collateral Estoppel: Appeal and Error.** The applicability of the doctrine of collateral estoppel constitutes a question of law. With regard to such a question, an appellate court is obligated to reach a conclusion independent from the lower court's conclusion.
2. **Convictions: Appeal and Error.** In determining whether evidence is sufficient to sustain a conviction in a bench trial, an appellate court does not resolve conflicts in evidence, pass on credibility of witnesses, evaluate explanations, or reweigh

evidence presented, which are within a fact finder's province for disposition. A conviction in a bench trial of a criminal case is sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that conviction. The trial court's findings have the effect of a verdict and will not be set aside unless clearly erroneous.

3. **Judgments: Intent.** The presence or absence of malice is a factual issue. However, whether a finding is sufficient to support a judgment is a question of law.
4. **Appeal and Error.** An appellate court always reserves the right to note plain error which was not complained of at trial or on appeal but is plainly evident from the record and which is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, or fairness of the judicial process.
5. **Sentences: Appeal and Error.** A sentence of imprisonment that is within the statutory limits will not be disturbed on appeal in the absence of an abuse of discretion by the trial court.
6. **Collateral Estoppel: Words and Phrases.** "Collateral estoppel" means that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties or their privies in any future lawsuit.
7. **Collateral Estoppel.** There are four conditions that must exist for the doctrine of collateral estoppel to apply: (1) The identical issue was decided in a prior action, (2) there was a judgment on the merits which was final, (3) the party against whom the rule is applied was a party or in privity with a party to the prior action, and (4) there was an opportunity to fully and fairly litigate the issue in the prior action.
8. **Criminal Law: Collateral Estoppel.** The doctrine of collateral estoppel may apply in criminal cases.
9. **Collateral Estoppel.** Nonmutual collateral estoppel involves the invocation of the doctrine by a nonparty to the original action. Mutuality of estoppel is not a requirement for the application of collateral estoppel in civil cases.
10. **Aiding and Abetting.** The common-law distinction between a principal and an aider and abettor has been abolished in Nebraska. A person who aids, abets, procures, or causes another to commit any offense may be prosecuted and punished as if he were the principal offender.
11. **Aiding and Abetting: Words and Phrases.** Aiding and abetting requires some participation in a criminal act and must be evidenced by some word, act, or deed. No particular acts are necessary, nor is it necessary that the defendant take physical part in the commission of the crime or that there was an express agreement to commit the crime. Mere encouragement or assistance is sufficient.
12. **Criminal Law: Aiding and Abetting: Intent: Liability.** When a crime requires the existence of a particular intent, an alleged aider or abettor can be held criminally liable as a principal if it is shown that the aider knew that the perpetrator of the act possessed the required intent, or that the aider himself possessed the required intent.
13. **Criminal Law: Aiding and Abetting: Convictions.** An aider and abettor can be

convicted of any crime, even a greater offense than the principal, provided the conviction is supported by the evidence of the facts and the defendant's state of mind.

14. **Homicide: Intent.** The essential elements in the crime of murder in the second degree are that the killing be done purposely and maliciously.
15. **Criminal Law: Trial.** A trial court sitting without a jury is not required to articulate findings of fact or conclusions of law in criminal cases. Faced with a timely request, a judge sitting as a trier of fact may state in writing the conclusions of fact separately from the conclusions of law.
16. **Criminal Law: Trial: Judges: Presumptions.** It is presumed in a jury-waived criminal trial that the judge was familiar with and applied the proper rules of law unless it otherwise clearly appears.
17. **Homicide: Sentences.** An indeterminate sentence cannot be imposed on a person convicted of second degree murder if the offense was committed prior to September 9, 1993.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Sentence vacated, and cause remanded for resentencing.

James R. Mowbray, of Mowbray & Walker, P.C., for appellant.

Don Stenberg, Attorney General, and Marilyn B. Hutchinson for appellee.

HASTINGS, C.J., WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ., and BOSLAUGH, J., Retired.

LANPHIER, J.

Phillip Secret, Jr., was charged with first degree murder for his part in the killing of Deron Haynes. Following a bench trial, the district court for Lancaster County adjudged Secret guilty of second degree murder and of the use of a firearm to commit a felony. Haynes was killed by a gunshot wound to the chest when shots were fired by several individuals into the trailer house Haynes was in. Secret's claims of error are based in part on the fact that the charges made against Secret were inconsistent with the charges made or found against other men involved in the shooting. The district court sentenced Secret to not less than 10 years' imprisonment to life on the murder charge and 4 to 6 years' imprisonment on the use of a firearm charge, with the sentences to be served consecutively.

In his appeal to this court, Secret challenges his second

degree murder conviction. Secret asserts that, because two other individuals involved in the killing were convicted in their separate trials of second degree murder, the State was estopped from proceeding with a first degree murder charge against him. Specifically, the principal, JaRon Dean, was convicted of second degree murder. See *State v. Dean, ante* p. 869, 523 N.W.2d 681 (1994). Secret further asserts the district court erred in convicting Secret of second degree murder without specifically finding that Dean killed the victim with malice. Finally, Secret challenges the district court's determination that he had aided and abetted Dean in an intentional killing. We affirm Secret's conviction for second degree murder. However, pursuant to *State v. Martin, ante* p. 896, 524 N.W.2d 58 (1994), we vacate his sentence because it was an indeterminate sentence imposed without statutory authority. This matter is remanded to the district court for resentencing for a determinate sentence as provided by the law.

BACKGROUND

This case arose initially out of a dispute over a hit-and-run traffic accident on October 21, 1992. The dispute escalated and ultimately ended with the death of Haynes. The facts are set out in *State v. Dean, supra*, and are only briefly recited here.

The day after the accident, Secret and some of his friends set out to find and confront the other party involved in the hit-and-run accident. The group traced the owner of the car, Haynes, by locating the car at an automobile body shop.

Secret apparently decided not to handle the matter through available legal means, but to proceed on his own. Secret confronted Haynes at the body shop. Haynes responded to the confrontation by going to the trunk of his car and pulling out a small handgun. Secret and his friends retreated and went to Secret's house in order to get a gun. Armed with a 12 gauge shotgun, the group set out a second time with the intent to find and confront Haynes. Secret testified that he armed himself only because he wanted to ask Haynes more questions and he thought the shotgun would prevent Haynes from pulling out his own weapon.

Secret learned that Haynes could be found at a trailer park

located near the intersection of 27th Street and Cornhusker Highway in Lincoln. The group located Haynes' trailer, but no one responded to Secret's shouts to come out and talk. After leaving the trailer park, the group went to a McDonald's restaurant, where they saw Haynes with others in the parking lot. One of Secret's friends grabbed the shotgun, and the two of them ran toward Haynes. Haynes sped off in a blue car.

Afterward, Secret and his friends spent several hours playing basketball and discussing the accident and the encounters with Haynes. Secret indicated he wanted to confront Haynes again, and his friends offered to back him up if they were supplied with guns. Secret was able to obtain a .38-caliber semiautomatic pistol, a 12 gauge shotgun, a .22-caliber revolver, and an AK-47 assault rifle. Thus armed, the group drove to the trailer park for the third and fatal encounter with Haynes.

At the trailer, Secret and his friends parked their automobile and distributed the weapons among themselves. Secret was unarmed, but directed the others to surround the trailer as he approached the door. As Secret was peeking in a window on the east side of the trailer, he heard repeated shots from the opposite side. Haynes was inside the trailer and suffered a fatal gunshot wound to the chest as he was in or arising from a chair. The investigation indicated that Dean fired the fatal bullet into the occupied trailer home with the AK-47 assault weapon.

Secret was charged with first degree murder in the death of Haynes. Secret was also charged with the use of a weapon to commit a felony.

Secret was the third individual tried on charges which arose from the same incident at the trailer park. See, *State v. Dean, ante* p. 869, 523 N.W.2d 681 (1994); *State v. Anderson*, 94 NCA No. 16, case No. A-93-746 (not designated for permanent publication). Prior to his trial, Secret moved to invoke collateral estoppel. Secret argued that the others' second degree murder convictions in the death of Haynes collaterally estopped the State from prosecuting him under an aiding and abetting theory of first degree murder. The district court overruled the motion to invoke collateral estoppel on August 16, 1993.

ASSIGNMENTS OF ERROR

Secret asserts the district court for Lancaster County erred (1) in denying Secret's motion to invoke collateral estoppel and failing to dismiss the charge of first degree murder; (2) in determining that Secret had aided and abetted Dean in an intentional killing; (3) in determining that Dean had committed an intentional killing, rather than manslaughter; and (4) in convicting Secret of second degree murder without making a specific finding that the victim had been killed with malice.

STANDARD OF REVIEW

The applicability of the doctrine of collateral estoppel constitutes a question of law. With regard to such a question, an appellate court is obligated to reach a conclusion independent from the lower court's conclusion. *Dean, supra*; *Kopecky v. National Farms, Inc.*, 244 Neb. 846, 510 N.W.2d 41 (1994).

In determining whether evidence is sufficient to sustain a conviction in a bench trial, an appellate court does not resolve conflicts in evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented, which are within a fact finder's province for disposition. A conviction in a bench trial of a criminal case is sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that conviction. The trial court's findings have the effect of a verdict and will not be set aside unless clearly erroneous. *Dean, supra*; *State v. Hand*, 244 Neb. 437, 507 N.W.2d 285 (1993); *State v. Crowdell*, 241 Neb. 216, 487 N.W.2d 273 (1992).

The presence or absence of malice is a factual issue. *Dean, supra*. See *State v. Jones*, 245 Neb. 821, 515 N.W.2d 654 (1994). However, whether a finding is sufficient to support a judgment is a question of law. *Dean, supra*. See *Cochran v. Cochran*, 62 Neb. 450, 87 N.W. 152 (1901).

An appellate court always reserves the right to note plain error which was not complained of at trial or on appeal but is plainly evident from the record and which is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, or fairness of the judicial process. *State v. Myers*, 244 Neb. 905, 510 N.W.2d

58 (1994); *State v. Bell*, 242 Neb. 138, 493 N.W.2d 339 (1992).

A sentence of imprisonment that is within the statutory limits will not be disturbed on appeal in the absence of an abuse of discretion by the trial court. *State v. Martin, ante* p. 896, 524 N.W.2d 58 (1994); *State v. Hoffman, ante* p. 265, 517 N.W.2d 618 (1994); *Hand, supra*.

COLLATERAL ESTOPPEL

Secret asserts that the district court erred in denying his motion to invoke collateral estoppel. Secret was the third individual tried on the same charges arising from the killing at the trailer park. On Secret's motion, the Lancaster County District Court took judicial notice of State v. Anderson, docket 84, page 126, and State v. Dean, docket 84, page 127, including all "pleading motions, orders and testimony," for the limited purpose of Secret's invocation of the doctrine of collateral estoppel.

Anderson and Dean were convicted of second degree murder for their participation in Haynes' death. Secret asserts that this fact estopped the State from prosecuting Secret for first degree murder.

"Collateral estoppel" means that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties or their privies in any future lawsuit. *Ashe v. Swenson*, 397 U.S. 436, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970); *State v. Dean, ante* p. 869, 523 N.W.2d 681 (1994); *In re Estate of Wagner, ante* p. 625, 522 N.W.2d 159 (1994).

There are four conditions that must exist for the doctrine of collateral estoppel to apply: (1) The identical issue was decided in a prior action, (2) there was a judgment on the merits which was final, (3) the party against whom the rule is applied was a party or in privity with a party to the prior action, and (4) there was an opportunity to fully and fairly litigate the issue in the prior action. *How v. Mars*, 245 Neb. 420, 513 N.W.2d 511 (1994); *Kopecky, supra*; *McCook Nat. Bank v. Myers*, 243 Neb. 853, 503 N.W.2d 200 (1993).

This court has recognized that the doctrine of collateral estoppel may apply in criminal cases. *Dean, supra*; *State v.*

Gerdes, 233 Neb. 528, 446 N.W.2d 224 (1989). Here, we are urged to allow the use of nonmutual collateral estoppel. Nonmutual collateral estoppel involves the invocation of the doctrine by a nonparty to the original action. *Dean, supra.* Mutuality of estoppel is not a requirement for the application of collateral estoppel in civil cases. *JED Constr. Co., Inc. v. Lilly*, 208 Neb. 607, 305 N.W.2d 1 (1981); *Peterson v. The Nebraska Nat. Gas Co.*, 204 Neb. 136, 281 N.W.2d 525 (1979).

In *Dean*, we rejected the proposition that a nonparty criminal defendant was afforded nonmutual collateral estoppel by the Constitutions of the United States or the State of Nebraska. Secret does not assert that he has a constitutional right to the assertion of nonmutual collateral estoppel. Regardless, Secret fails to meet the first part of the four-part test governing the applicability of the doctrine. Secret fails to establish that an identical issue was decided in the trials of Anderson or Dean.

The fact that Anderson and Dean were convicted of second degree murder did not estop the State from prosecuting Secret for first degree murder. As fully explained in the next section, the issue of Secret's intent is distinct from the issue of Anderson's or Dean's intent. Therefore, Secret's first assignment of error is without merit.

AIDING AND ABETTING

Secret was charged with aiding and abetting a first degree murder. The district court held that the State had failed to prove beyond a reasonable doubt that Secret had aided and abetted a first degree murder, but held that Secret had aided and abetted a second degree murder. In his second and third assignments of error, Secret asserts the district court erred in determining that he had aided and abetted Dean in an intentional killing and in determining that Dean had committed an intentional killing rather than manslaughter. Secret's arguments are premised on the erroneous assertion that an aider and abettor cannot be convicted of a greater offense than a principal.

The common-law distinction between a principal and an aider and abettor has been abolished in Nebraska. *State v. Thomas*, 210 Neb. 298, 314 N.W.2d 15 (1981); *State v. Rice*, 188

Neb. 728, 199 N.W.2d 480 (1972). "A person who aids, abets, procures, or causes another to commit any offense may be prosecuted and punished as if he were the principal offender." Neb. Rev. Stat. § 28-206 (Reissue 1989). Aiding and abetting requires some participation in a criminal act and must be evidenced by some word, act, or deed. No particular acts are necessary, nor is it necessary that the defendant take physical part in the commission of the crime or that there was an express agreement to commit the crime. Mere encouragement or assistance is sufficient. *State v. Sanders*, 241 Neb. 687, 490 N.W.2d 211 (1992); *State v. Bennett*, 219 Neb. 601, 365 N.W.2d 423 (1985); *State v. True*, 210 Neb. 701, 316 N.W.2d 623 (1982).

Secret argues that the prosecution had to prove beyond a reasonable doubt (1) that Secret helped or encouraged Dean to intentionally kill Haynes; (2) that Secret knew Dean intended to commit the crime; and (3) that Dean, in fact, intentionally killed Haynes. However, when a crime requires the existence of a particular intent, an alleged aider or abettor can be held criminally liable as a principal if it is shown that the aider knew that the perpetrator of the act possessed the required intent, *or that the aider himself possessed the required intent*. *State v. Carter*, 241 Neb. 645, 489 N.W.2d 846 (1992); *State v. Dittrich*, 191 Neb. 475, 215 N.W.2d 637 (1974). An aider and abettor can be convicted of any crime, even a greater offense than the principal, provided the conviction is supported by the evidence of the facts and the defendant's state of mind. *Thomas, supra*. Therefore, Secret's conviction could be based on Dean's intent or Secret's own intent.

Secret urges this court to examine the evidence and conclude that the State failed to prove that Secret intentionally and maliciously aided and abetted Dean in the killing of Haynes. Intent may be inferred from the words or acts of the defendant and from the circumstances surrounding the incident. *State v. Russell*, 243 Neb. 106, 497 N.W.2d 393 (1993); *State v. Rokus*, 240 Neb. 613, 483 N.W.2d 149 (1992); *State v. Costanzo*, 227 Neb. 616, 419 N.W.2d 156 (1988). In determining whether evidence is sufficient to sustain a conviction in a bench trial, an appellate court does not resolve conflicts in evidence, pass on credibility of witnesses, evaluate explanations, or reweigh

evidence presented. A conviction in a bench trial of a criminal case is sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that conviction. *State v. Dean, ante* p. 869, 523 N.W.2d 681 (1994); *State v. Hand*, 244 Neb. 437, 507 N.W.2d 285 (1993); *State v. Crowdell*, 241 Neb. 216, 487 N.W.2d 273 (1992). The district court's findings were not clearly erroneous and will not be set aside.

SPECIFIC FINDING OF MALICE NOT REQUIRED

Secret asserts that the district court erred in convicting him of second degree murder without making a specific finding that the victim had been killed with malice. The essential elements in the crime of murder in the second degree are that the killing be done purposely and maliciously. *State v. Grimes, ante* p. 473, 519 N.W.2d 507 (1994); *State v. Myers*, 244 Neb. 905, 510 N.W.2d 58 (1994).

A trial court sitting without a jury is not required to articulate findings of fact or conclusions of law in criminal cases. *State v. Franklin*, 241 Neb. 579, 489 N.W.2d 552 (1992); *State v. Lozano*, 209 Neb. 772, 311 N.W.2d 529 (1981); *State v. Cowan*, 204 Neb. 708, 285 N.W.2d 113 (1979). Faced with a timely request, a judge sitting as a trier of fact may state in writing the conclusions of fact separately from the conclusions of law. See *Franklin, supra*.

Although there is no indication that Secret requested the district court to make specific findings, the court did file a document entitled "Findings." In that document, the district court did not specifically state that the killing was done maliciously. However, the trial court did conclude that Secret willfully and intentionally aided and abetted Dean in the killing of Haynes by furnishing three weapons, finding the house where Haynes was staying, and directing the gunmen to that location. Further, the trial court concluded that Secret organized and directed the attack on the trailer.

It is presumed in a jury-waived criminal trial that the judge was familiar with and applied the proper rules of law unless it otherwise clearly appears. *Franklin, supra*; *Cowan, supra*. The trial court concluded "beyond a reasonable doubt that Phillip Secret, Jr. is guilty of the commission of the crime of murder in

the second degree." A specific finding of malice is not required to support this conclusion.

SENTENCING ERRORS

Secret was convicted of second degree murder for a crime that was committed on October 22, 1992. Secret was "sentenced to the Department of Correctional Services for incarceration in the Nebraska Penal Complex for not less than ten (10) years to life, credit for 383 days served." The sentence imposed upon Secret was an indeterminate sentence.

Although Secret does not assign as error the imposition of an indeterminate sentence, an appellate court always reserves the right to note plain error which is plainly evident from the record and which is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, or fairness of the judicial process. See, *Myers, supra*; *State v. Bell*, 242 Neb. 138, 493 N.W.2d 339 (1992).

Previously, indeterminate sentences could not be imposed upon one convicted of second degree murder. *State v. Martin, ante* p. 896, 524 N.W.2d 28 (1994); *State v. Ward*, 226 Neb. 809, 415 N.W.2d 151 (1987); *State v. Moss*, 219 Neb. 327, 363 N.W.2d 367 (1985); *State v. Laravie*, 192 Neb. 625, 223 N.W.2d 435 (1974). In 1993, the Legislature amended Neb. Rev. Stat. § 29-2204 (Supp. 1993), which, effective September 9, 1993, specifically altered the indeterminate sentencing for second degree murder. However, indeterminate sentences cannot be imposed when the offense was committed prior to September 9, 1993. *Martin, supra.* Secret's crime was committed 1 year prior to that date; therefore, the district court acted without statutory authority when it imposed an indeterminate sentence.

Furthermore, the court gave Secret credit for the 383 days served against his life sentence. A defendant is not entitled to credit for time served against a life sentence. *State v. Masters, post* p. 1018, 524 N.W.2d 342 (1994).

CONCLUSION

Secret's conviction of second degree murder is affirmed, but the sentence is vacated, and this matter is remanded to the district court so that an authorized and appropriate

determinate sentence may be imposed on Secret. Upon resentencing, credit for time served may be granted pursuant to *Masters, supra*.

SENTENCE VACATED, AND CAUSE REMANDED FOR RESENTENCING.

WRIGHT, J., concurs in the result.

KATHLEEN M. GRADY, APPELLANT, V. VISITING NURSE ASSOCIATION, APPELLEE.

524 N.W.2d 559

Filed December 2, 1994. No. S-94-128.

1. **Motions for Continuance: Appeal and Error.** Generally, a motion for a continuance is addressed to the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion.
2. **Judges: Words and Phrases: Appeal and Error.** A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system.
3. **Statutes: Appeal and Error.** Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below.
4. **Statutes.** A court will construe statutes relating to the same subject matter together so as to maintain a consistent and sensible scheme.
5. **Appeal and Error.** To be considered by an appellate court, errors must be assigned and discussed in the brief of the one claiming that the prejudicial error has occurred.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Steven Lefler and Frederick D. Franklin, of Lefler & Franklin, for appellant.

Timothy W. Marron, of Timmermier, Gross & Burns, for appellee.

HASTINGS, C.J., WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ., and BOSLAUGH, J., Retired.

BOSLAUGH, J., Retired.

This is an appeal from an order of the Nebraska Workers' Compensation Court which held that the plaintiff, Kathleen M. Grady, had not proved that she was entitled to any disability compensation or payment of medical expenses. The compensation court dismissed the petition with prejudice, and the plaintiff applied for a review of the decision by a panel of three compensation court judges. The panel affirmed the order, and the plaintiff has appealed to this court.

The plaintiff was employed as a home health care worker by the appellee, Visiting Nurse Association (VNA). On July 30, 1991, the plaintiff suffered a back injury while lifting a patient. She filed a petition in the compensation court on June 1, 1992, seeking compensation for her injuries. VNA answered the petition, denying that the plaintiff had suffered a compensable accident during the course of her employment.

The matter, which had been set for trial on March 31, 1993, was continued until June 25, 1993, at the plaintiff's request. The plaintiff requested a second continuance, which was denied. The day before the trial was to begin, the plaintiff filed a motion for dismissal without prejudice. This motion was also denied. In denying the plaintiff's motion, the compensation court relied upon Neb. Rev. Stat. § 48-177 (Reissue 1993). That statute provides in part: "Upon a motion for dismissal duly filed by the plaintiff, showing that a dispute between the parties no longer exists, the compensation court may dismiss any such cause without a hearing thereon." This section, which applies specifically to the Workers' Compensation Court, only allows the dismissal of a case by a plaintiff if the plaintiff shows that no controversy exists between the parties. This provision was added by an amendment to the Workers' Compensation Act in 1949. 1949 Neb. Laws, ch. 161, § 5, p. 413. The title to the act provided: "An act . . . to provide a procedure for dismissal of causes . . . ." The plaintiff elected not to participate in the trial.

VNA offered exhibits which were received into evidence by the compensation court. The compensation court issued an order dismissing the petition. This ruling was upheld on review by the three-judge panel.

The plaintiff has appealed from the ruling of the Workers'

Compensation Court, assigning as error, in summary, the following acts of the court: (1) the denial of her motion for a continuance, (2) the denial of her motion for dismissal without prejudice, and (3) the dismissal of her petition with prejudice. We address the alleged errors seriatim.

Generally, a motion for a continuance is addressed to the discretion of the trial court, whose ruling will not be disturbed on appeal in the absence of an abuse of discretion. *Stewart v. Amigo's Restaurant*, 240 Neb. 53, 480 N.W.2d 211 (1992); *Wachtel v. Beer*, 229 Neb. 392, 427 N.W.2d 56 (1988).

Under Workers' Comp. Ct. R. of Proc. 8 (1994), "[n]o continuance will be granted in any event unless good cause is shown." The plaintiff disagreed with her physician's conclusions regarding the degree of her disability. She requested the continuance in order to seek an additional medical opinion. The compensation court denied the request.

The plaintiff argues that she had good cause for a continuance and that her case was prejudiced by the disallowance to seek a second medical opinion. The question before this court is not, however, whether the plaintiff had good cause for a continuance, but, rather, whether the trial court abused its discretion in denying the request.

A judicial abuse of discretion exists when a judge, within the effective limits of authorized judicial power, elects to act or refrain from action, but the selected option results in a decision which is untenable and unfairly deprives a litigant of a substantial right or a just result in matters submitted for disposition through a judicial system. *Marr v. Marr*, 245 Neb. 655, 515 N.W.2d 118 (1994); *Kopecky v. National Farms, Inc.*, 244 Neb. 846, 510 N.W.2d 41 (1993).

We must determine whether this decision is untenable. The plaintiff was allowed to choose her own physician, and she was not limited to seeing one doctor. In addition, she knew that the trial schedule was such that, upon receiving an opinion from her doctor, time would not permit her to consult with a second doctor before the trial date.

The decision of the compensation court did not unfairly deprive the plaintiff of a substantial right. The plaintiff points to no substantial right which was affected by the decision to

deny the motion for continuance. The compensation court did not abuse its discretion in this matter, and the plaintiff's assignment of error fails on this issue.

The plaintiff's second assignment of error concerns the denial of her motion for dismissal without prejudice and the interpretation of the statutes that apply thereto. Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below. *Abdullah v. Nebraska Dept. of Corr. Servs.*, 245 Neb. 545, 513 N.W.2d 877 (1994); *Rigel Corp. v. Cutchall*, 245 Neb. 118, 511 N.W.2d 519 (1994).

The plaintiff claims that a general statute, Neb. Rev. Stat. § 25-601 (Reissue 1989), applies to her action. That section provides, in pertinent part: "An action may be dismissed without prejudice to a future action (1) by the plaintiff, before the final submission of the case to the jury, or to the court where the trial is by the court . . . ." This court has previously held that "a plaintiff may dismiss his action without prejudice as a matter of right at any time before final submission. It is a statutory right and not a matter of judicial grace or discretion." *Koll v. Stanton-Pilger Drainage Dist.*, 207 Neb. 425, 426, 299 N.W.2d 435, 436 (1980). Accord *Gebhart v. Tri-State G. & T. Assn.*, 181 Neb. 457, 149 N.W.2d 41 (1967).

Other statutes apply to the facts of this case. Neb. Rev. Stat. § 48-163 (Cum. Supp. 1992) contains the following provision:

> The Nebraska Workers' Compensation Court may adopt and promulgate all reasonable rules and regulations necessary for carrying out the intent and purpose of the Nebraska Workers' Compensation Act and shall administer and enforce all of the provisions of such act, except such as are committed to the Supreme Court.

Also, Neb. Rev. Stat. § 48-168 (Reissue 1988) states: "The Nebraska Workers' Compensation Court shall not be bound by the usual common-law or statutory rules of evidence or by any technical or formal rules of procedure . . . ."

In keeping with the spirit of the above statutes, this court has prescribed few procedural standards for the Workers' Compensation Court. See, *Harpham v. General Cas. Co.*, 232

Neb. 568, 441 N.W.2d 600 (1989) (due process requirements may control the type of evidence that is admissible in a workers' compensation case); *Fite v. Ammco Tools, Inc.*, 199 Neb. 353, 258 N.W.2d 922 (1977) (Workers' Compensation Court evidentiary standards may not be more restrictive than the Nebraska rules of evidence). We see no reason to further circumscribe the authority of the Workers' Compensation Court in this case.

The plaintiff contends that § 25-601 should be controlling because it does not specifically state that it is inapplicable in the Workers' Compensation Court. We disagree. If statutes were deemed applicable in the Workers' Compensation Court unless specifically excluded, then §§ 48-163 and 48-168, which specifically exempt that court from formal rules of procedure, would be without meaning. A court will construe statutes relating to the same subject matter together so as to maintain a consistent and sensible scheme. *In re Interest of Powers*, 242 Neb. 19, 493 N.W.2d 166 (1992); *In re Estate of Morse*, 241 Neb. 40, 486 N.W.2d 195 (1992). Section 25-601 does not apply to the Workers' Compensation Court, and the plaintiff's assignment of error is without merit.

Finally, the plaintiff assigns as error the dismissal of her petition with prejudice. This assignment of error was not discussed in the brief. To be considered by an appellate court, errors must be assigned and discussed in the brief of the one claiming that the prejudicial error has occurred. *Franksen v. Crossroads Joint Venture*, 245 Neb. 863, 515 N.W.2d 794 (1994); *State v. Vermuele*, 241 Neb. 923, 492 N.W.2d 24 (1992). No clear error being apparent in the record, the plaintiff's final assignment of error is without merit.

For the above reasons, the judgment of the Nebraska Workers' Compensation Court is affirmed.

AFFIRMED.

WHITE, J., dissenting.

As I can see no reason that justifies a different rule relating to voluntary dismissals before trial applicable only to the Workers' Compensation Court, I dissent. Neb. Rev. Stat. § 48-163 (Cum. Supp. 1992) surely cannot be said to supersede this court's general administrative authority over all courts. See

Neb. Const. art. V, § 1.

In the exercise of our administrative authority, and in the interest of consistent rules of procedure in all trial courts, I would disapprove the compensation court rule and reverse the decision of that court.

LANPHIER, J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, V. CHRISTOPHER M. MASTERS, APPELLANT.

524 N.W.2d 342

Filed December 2, 1994. No. S-94-150.

1. **Convictions: Appeal and Error.** A conviction in a bench trial of a criminal case is sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that conviction.
2. _____: _____. In determining whether evidence is sufficient to sustain a conviction in a bench trial, an appellate court does not resolve conflicts in evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented, which are within a fact finder's province for disposition.
3. _____: _____. A trial court's findings have the effect of a jury verdict and will not be set aside unless clearly erroneous.
4. **Kidnapping: Words and Phrases.** A person commits kidnapping if he abducts another or, having abducted another, continues to restrain him with intent to terrorize him or a third person.
5. **False Imprisonment: Words and Phrases.** A person commits false imprisonment in the first degree if he knowingly restrains or abducts another person under terrorizing circumstances or under circumstances which expose the person to the risk of serious bodily injury.
6. _____: _____. Restrain shall mean to restrict a person's movement in such a manner as to interfere substantially with his liberty by means of force, threat, or deception.
7. _____: _____. Abduct shall mean to restrain a person with intent to prevent his liberation by endangering or threatening to endanger the safety of any human being.
8. **Criminal Law: Kidnapping: False Imprisonment.** It is the intent to terrorize which distinguishes kidnapping from false imprisonment in the first degree.
9. **Intent: Words and Phrases.** Intent is the state of the actor's mind when the actor's conduct occurs.

10. _____: _____. The intent operative at the time of an action may be inferred from the words and acts of an accused and from the facts and circumstances surrounding the conduct.
11. **Homicide: Words and Phrases.** Any murder in the perpetration of or attempt to perpetrate a sexual assault in the first degree, arson, robbery, kidnapping, hijacking, or burglary is murder in the first degree. Neb. Rev. Stat. § 28-303(2) (Reissue 1989).
12. **Homicide: Lesser-Included Offenses.** Manslaughter is not a lesser-included offense to the crime of felony murder.
13. **Homicide: Lesser-Included Offenses: Jury Instructions.** When an information charges a defendant with a felony murder, it charges only murder in the first degree, and it is error for the trial court to instruct the jury that it may find the defendant guilty of murder in the first degree, guilty of murder in the second degree, or guilty of manslaughter.
14. **Homicide: Lesser-Included Offenses: Proof.** Second degree murder or manslaughter is included within a regular charge of first degree murder because the mental state of the defendant determines the degree of the crime. In a felony murder case, the proof of a particular mental state is not required as to the killing.
15. **Homicide: Sentences.** On being sentenced for life imprisonment upon conviction of first degree murder, a defendant is not entitled to credit for time in custodial detention pending trial and sentence.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Affirmed and remanded with direction.

Thomas M. Kenney, Douglas County Public Defender, and Thomas C. Riley for appellant.

Don Stenberg, Attorney General, and Delores Coe-Barbee for appellee.

HASTINGS, C.J., WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ., and BOSLAUGH, J., Retired.

FAHRNBRUCH, J.

Christopher M. Masters appeals his convictions and sentences for first degree felony murder and for use of a firearm in the commission of a felony in the execution-style shotgun killing of 15-year-old Jeremy Drake.

We affirm Masters' convictions and sentences but remand the cause to the district court with direction to give Masters credit on his firearm sentence for the time he served prior to sentencing.

STANDARD OF REVIEW

A conviction in a bench trial of a criminal case is sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that conviction. *State v. Hand*, 244 Neb. 437, 507 N.W.2d 285 (1993).

In determining whether evidence is sufficient to sustain a conviction in a bench trial, an appellate court does not resolve conflicts in evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented, which are within a fact finder's province for disposition. *Id.*

A trial court's findings have the effect of a jury verdict and will not be set aside unless clearly erroneous. *Id.*

FACTS

On October 8, 1992, Jeremy Herman telephoned Drake and asked Drake to meet him at a gas station on the pretext that they would obtain marijuana and smoke it together. Herman believed that Drake was involved in the recent theft of Herman's car stereo speakers or knew who was involved. Drake and Herman had at one time been close friends, but had been estranged for several months at the time of the events at issue herein.

Before arranging the meeting with Drake, Herman attempted to borrow a sawed-off shotgun from Masters, a recent acquaintance of Herman. Masters refused to loan the shotgun to Herman, but agreed to go with Herman to meet Drake. Herman testified that Masters stated at that time that "if he [Masters] was going to point his gun at anybody, he was going to plan on using it." Driving his own car, Herman picked up Masters prior to meeting Drake, and Masters brought the shotgun along in a cloth carrying case.

Herman and Masters met Drake at the predetermined gas station. Masters got out of the car so Drake could get into the backseat of the two-door vehicle. Herman drove to Hanscom Park, where Masters unsheathed the gun, displayed it to Drake, and questioned him about the theft. Drake initially indicated he knew nothing.

While Masters was pointing his sawed-off shotgun at Drake, Herman heard Masters strike or slap Drake, causing the

victim's contact lens to fall out of his right eye. Masters showed Drake that his shotgun was loaded and threatened " 'to blow [Drake's] guts all over the back seat of [the] car' " unless he talked. Herman testified that Drake was scared, that he had a "stunned look" on his face after being struck by Masters, and that at one point Drake was crying.

Drake finally stated that a Bobby Baratta had taken the speakers and directed Herman to Baratta's house. Herman talked briefly to Baratta while Drake and Masters remained in Herman's vehicle. Baratta testified that, at some point, Masters got out of the vehicle holding something which he thought was a weapon and shouted at Baratta. Shortly thereafter, Herman and Masters left Baratta's house with Drake, and Herman drove to Hummel Park, during which time Herman and Masters, in Drake's presence, discussed whether to let Drake go or to kill him.

At Hummel Park, Masters directed Herman to a place called Lookout Point. All three males exited the vehicle. Masters and Drake walked down a path together into the woods. Masters carried his sawed-off shotgun. Herman testified that he stayed back to watch for other vehicles.

After several minutes of silence, Herman heard a gunshot which he thought had come from Masters' gun and ran to investigate. Herman was met by Masters, who said that he had accidentally shot Drake and that Drake was dead.

Shannon Shaw, an individual who lived with Masters' family, testified that later that evening of October 8 or early October 9, Masters took him to Hummel Park and showed him Drake's body. Shaw testified Masters said that he had instructed Drake to get down on his hands and knees, kneeling on the ground with his hands behind his head, and that Masters had shot Drake in that position.

A pathologist testified that the cause of death was a shotgun wound to the left posterior lateral back and that the angle of the shot was consistent with Drake having been shot from the back while on his hands and knees.

Masters was originally charged by information with first degree premeditated murder, felony murder, and use of a firearm in the commission of a felony. Before trial, the State

was permitted to delete the charge of premeditated murder. On the murder of Drake, the State relied solely on a charge of murder in the commission of a kidnapping.

Masters waived his right to a jury trial and, after a bench trial, was found guilty of murder in the commission of a kidnapping and use of a firearm to commit a felony. The court sentenced Masters to life imprisonment for the felony murder conviction and to 6 1/3 to 20 years' imprisonment for the firearm conviction, those terms to be served consecutively. Over defense counsel's objection, Masters was given no credit for time served.

Masters timely appealed to this court.

ASSIGNMENTS OF ERROR

Masters claims that the trial court erred in (1) finding him guilty of first degree felony murder because there is insufficient evidence upon which to find that he killed Drake while in the commission of a kidnapping as defined in Neb. Rev. Stat. § 28-313 (Reissue 1989), (2) refusing to consider the lesser-included offense of manslaughter, and (3) refusing to grant him credit for time served while incarcerated prior to sentencing.

ANALYSIS

SUFFICIENCY OF EVIDENCE

Masters claims that the evidence was insufficient for the trial court to find him guilty of kidnapping Drake. Masters argues that his actions instead constituted false imprisonment in the first degree.

According to § 28-313(1), "[a] person commits kidnapping *if he abducts another* or, having abducted another, *continues to restrain him with intent to . . . [t]errorize him* or a third person . . . ." (Emphasis supplied.)

"A person commits false imprisonment in the first degree if he *knowingly restrains or abducts another person (a) under terrorizing circumstances* or under circumstances which expose the person to the risk of serious bodily injury . . . ." (Emphasis supplied.) Neb. Rev. Stat. § 28-314(1) (Reissue 1989).

The terms "abduct" and "restrain" are defined by Neb. Rev.

Stat. § 28-312 (Reissue 1989) as follows:

> (1) *Restrain* shall mean *to restrict a person's movement* in such a manner as to interfere substantially with his liberty:
>
> (a) *By means of force, threat, or deception* . . .
>
> . . .
>
> (2) *Abduct* shall mean to *restrain a person with intent to prevent his liberation* by:
>
> . . .
>
> (b) Endangering or *threatening to endanger the safety of any human being.*

(Emphasis supplied.)

The evidence reflects that Masters, armed with a sawed-off shotgun, restrained Drake's movements by keeping him in the back seat of a two-door vehicle, which was often moving during this episode. Masters accomplished this restraint through the use of force against Drake, striking Drake in the face hard enough to knock Drake's contact lens out of his right eye. Masters held Drake at gunpoint while questioning him, showed him that the gun was loaded, and threatened to " 'blow [Drake's] guts all over the back seat' " of the car if Drake failed to cooperate. The foregoing is ample evidence from which the trier of fact could conclude beyond a reasonable doubt that Masters restrained Drake both by means of force and by means of threats.

Moreover, this same evidence is sufficient for the trier of fact to conclude beyond a reasonable doubt that Masters abducted Drake, that is, Masters restrained Drake with the intent to prevent his liberation by threatening to endanger Drake's safety. This conclusion is further supported by Herman's testimony that he and Masters deliberated in Drake's presence whether to liberate Drake or to kill him, after which Masters ultimately killed Drake.

Finally, there is sufficient evidence from which the trier of fact could conclude beyond a reasonable doubt that Masters abducted and restrained Drake *with the intent to terrorize him.* It is the *intent to terrorize* which distinguishes kidnapping from false imprisonment in the first degree. See *State v. Miller*, 216 Neb. 72, 341 N.W.2d 915 (1983) (holding that kidnapping

requires proof of a specific intention which is not an element of false imprisonment).

In this case, it is abundantly clear that Master's sole purpose for being in Herman's vehicle was to terrorize Drake. Herman testified that he had originally attempted to borrow Masters' sawed-off shotgun because he thought he "might need it to scare [Drake]." Although Masters refused to lend Herman his sawed-off shotgun, he agreed to bring the shotgun and accompany Herman.

During the course of events leading to Masters' shooting of Drake, Masters kept his weapon pointed at Drake for much of the time, showed Drake that the weapon was loaded, struck Drake in the face, threatened " 'to blow [Drake's] guts all over the back seat' " unless Drake talked, and discussed with Herman whether they should leave Drake in Hummel Park or kill him. Once at Hummel Park, Masters walked Drake down a secluded path into the woods and instructed him to kneel, the position in which Drake was then shot by Masters.

"Intent" is the state of the actor's mind when the actor's conduct occurs. *State v. Rokus*, 240 Neb. 613, 483 N.W.2d 149 (1992). The intent operative at the time of an action may be inferred from the words and acts of an accused and from the facts and circumstances surrounding the conduct. *State v. Meyer*, 236 Neb. 253, 460 N.W.2d 656 (1990). The trier of fact could infer beyond a reasonable doubt from the words and acts of Masters and from the facts and circumstances surrounding Masters' conduct throughout Drake's ordeal that Masters intended to terrorize Drake.

There was sufficient evidence from which a trier of fact could conclude beyond a reasonable doubt that Masters was guilty of abducting Drake, that he restrained Drake, and that he did so with the intent to terrorize Drake. Thus, there was sufficient evidence from which the trier of fact could find beyond a reasonable doubt that Masters shot and killed Drake during the commission of a kidnapping. Master's first assignment of error is without merit.

LESSER-INCLUDED OFFENSE

Next, Masters contends that the trial court erred in refusing

to consider the lesser-included offense of manslaughter. As previously noted, Masters was tried on a charge of felony murder, the charge of premeditated murder having been deleted from the information by the State before trial. The court announced that it would confine its deliberations to the theory of murder left in the information at the time of trial.

Any murder in the perpetration of or attempt to perpetrate a sexual assault in the first degree, arson, robbery, kidnapping, hijacking, or burglary is murder in the first degree. See Neb. Rev. Stat. § 28-303(2) (Reissue 1989). It has long been the law in this state that manslaughter is not a lesser-included offense to the crime of felony murder. See *Morgan v. State*, 51 Neb. 672, 71 N.W. 788 (1897).

When an information charges a defendant with a felony murder, it charges only murder in the first degree, and it is error for the trial court to instruct the jury that it may find the defendant guilty of murder in the first degree, guilty of murder in the second degree, or guilty of manslaughter. See, e.g., *State v. Ruyle*, 234 Neb. 760, 452 N.W.2d 734 (1990) (homicide in the perpetration of an arson); *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984), *cert. denied* ____ U.S. ____, 113 S. Ct. 114, 121 L. Ed. 2d 71 (1992) (homicide committed in perpetration of or attempt to perpetrate a first degree sexual assault); *State v. Hubbard*, 211 Neb. 531, 319 N.W.2d 116 (1982) (homicide committed in perpetration of or attempt to perpetrate a robbery); *State v. McDonald*, 195 Neb. 625, 240 N.W.2d 8 (1976) (homicide committed in perpetration of a robbery); *Garcia v. State*, 159 Neb. 571, 68 N.W.2d 151 (1955) (homicide committed in perpetration of a robbery).

"Second degree murder or manslaughter are [sic] included within a regular charge of first degree murder because the mental state of the defendant determines the degree of the crime. In a felony murder case, the proof of a particular mental state is not required as to the killing." *McDonald*, 195 Neb. at 636-37, 240 N.W.2d at 15.

Thus, had Masters asserted his right to trial by jury, it clearly would have been error for the trial court to instruct the jury that it could consider manslaughter as a lesser-included offense. Similarly, it would have been error for the trial court, in its

capacity as finder of fact at Masters' bench trial, to consider manslaughter as a lesser-included offense of felony murder. In fact, in *Thompson v. State*, 106 Neb. 395, 184 N.W. 68 (1921), this court reversed the defendant's conviction for manslaughter because the information charged the defendant with only homicide in the attempted perpetration of a robbery, and the information was therefore insufficient to sustain the verdict.

Masters cites *Beck v. Alabama*, 447 U.S. 625, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980), and *Schad v. Arizona*, 501 U.S. 624, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991), as authority for the proposition that lesser-included offenses to felony murder must be considered by the finder of fact. Both of these cases are distinguishable on their facts.

In *Beck*, an Alabama jury was given the alternative of finding a defendant guilty of the capital crime of robbery-intentional killing *and* imposing the death penalty or finding the defendant not guilty. The trial court refused to give a requested lesser-included offense jury instruction.

The issue before the U.S. Supreme Court was whether a sentence of death could be constitutionally imposed after a jury verdict of guilt of a capital offense when the jury was not permitted to consider a verdict of guilt of a lesser-included noncapital offense and when the evidence would have supported such a verdict. The Court held that the death penalty could not be constitutionally imposed under those circumstances.

The U.S. Supreme Court reasoned that the choice given the jury "would seem inevitably to enhance the risk of an unwarranted conviction" and stated that "[s]uch a risk cannot be tolerated in a case *in which the defendant's life is at stake*." (Emphasis supplied.) 447 U.S. at 637.

In the present case, the finder of fact was not presented with the "death-penalty-or-acquit" situation in *Beck*. To the contrary, under Nebraska law the issue of guilt or innocence is determined separately from the issue of sentencing. See Neb. Rev. Stat. § 29-2520 (Reissue 1989). Moreover, Masters was not sentenced to death, but to life imprisonment. Thus, the risk which the Court found intolerable in *Beck* is simply not present in Masters' case.

In *Schad*, a defendant was charged in the alternative with premeditated murder and murder in the perpetration of a robbery. The court instructed the jury on the lesser-included offense of second degree murder, but refused the defendant's requested jury instruction on robbery as a lesser-included offense. The defendant was convicted of first degree murder and was sentenced to death by the judge after a further hearing.

One of two issues on appeal to the U.S. Supreme Court was whether the Court's holding in *Beck* mandated an instruction on robbery, which Schad characterized as a lesser-included offense of robbery murder. Schad maintained that *Beck* requires that a jury in a capital case be instructed on every lesser-included noncapital offense supported by the evidence. The Supreme Court disagreed and held that the second degree murder instruction was sufficient to ensure the verdict's reliability.

In neither *Beck* nor *Schad* was it necessary for the Supreme Court to reach the issue of whether manslaughter is a lesser-included offense of felony murder. However, in *Spaziano v. Florida*, 468 U.S. 447, 104 S. Ct. 3154, 82 L. Ed. 2d 340 (1984), the U.S. Supreme Court held that a defendant was not entitled to a lesser-included offense instruction under *Beck* when no lesser-included offense existed.

We find that Masters was not entitled to a lesser-included offense instruction under either *Beck* or *Schad*, there being no lesser-included offenses to felony murder under Nebraska law. Masters' second assignment of error is without merit.

CREDIT FOR TIME SERVED

Finally, Masters contends that he is entitled to credit for the time he was incarcerated prior to sentencing.

Neb. Rev. Stat. § 83-1,106(1) (Cum. Supp. 1992) requires that the trial court give an offender credit against the maximum term and any minimum term for time spent in custody as a result of the criminal charge for which a prison sentence is imposed. However, this court has held that, on being sentenced for life imprisonment upon conviction of first degree murder, a defendant is not entitled to credit for time in custodial detention pending trial and sentence. See *State v. Lynch*, 215 Neb. 528,

340 N.W.2d 128 (1983).

In *Lynch*, we explained that the purpose of credit under § 83-1,106

> is to avoid the situation where one convicted of a crime is incarcerated for a period greater than the maximum term of years prescribed as punishment for the particular offense. . . . By its very nature [a life] sentence is indefinite. . . . In the case of a life sentence, it is impossible to impose punishment exceeding the term prescribed by statute.

215 Neb. at 537, 340 N.W.2d at 134.

Had Masters received only a life sentence, he would not be entitled to time served. However, because Masters also received a consecutive sentence of 6 1/3 to 20 years on his firearm conviction, a sentence with a maximum and minimum term, he is entitled to credit against that sentence for time he served prior to sentencing. Accordingly, we affirm both of Masters' sentences but remand the cause to the district court with direction to credit Masters' firearm sentence with the amount of time he served prior to sentencing.

CONCLUSION

There being no merit to Masters' first two assignments of error, his convictions for first degree felony murder and for use of a firearm in the commission of a felony are affirmed. Masters' sentences are affirmed, but the cause is remanded to the district court with direction to give Masters credit for time he served prior to his sentencing on his firearm conviction.

AFFIRMED AND REMANDED WITH DIRECTION.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. ROY E. MEHMKEN, RESPONDENT.

524 N.W.2d 350

Filed December 2, 1994. No. S-94-219.

Original action. Judgment of disbarment.

HASTINGS, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ., and BOSLAUGH, J., Retired.

PER CURIAM.

Roy E. Mehmken was admitted to the practice of law in Nebraska in 1970. On or about June 2, 1992, Mehmken was charged in the county court for Lancaster County, Nebraska, with three counts of the misdemeanor offense of issuing a bad check, in violation of Neb. Rev. Stat. § 28-611 (Reissue 1989). On May 3, 1993, Mehmken pled guilty to one count of issuing a bad check and was fined $100 plus court costs. The remaining two counts were dismissed on motion of the county attorney.

Mehmken was also charged on March 3, 1993, in the district court for Lancaster County with the felony offense of theft by unlawful taking, in violation of Neb. Rev. Stat. § 28-511 (Reissue 1989). On July 9, the above-mentioned charge was reduced to the misdemeanor offense of attempted theft by unlawful taking. Mehmken entered a plea of no contest and was found guilty by the district court. Mehmken was sentenced to serve 10 months in the Lancaster County jail and ordered to pay restitution in the amount of $1,000.

This court temporarily suspended Mehmken from the practice of law in Nebraska on March 3, 1994, until further order. On August 18, formal charges were duly filed and served by the Nebraska State Bar Association. Mehmken failed to respond to the formal charges within the 20 days allowed by Neb. Ct. R. of Discipline 10(H) (rev. 1992). As provided by rule 10(I), this matter may be disposed of by this court on its own motion.

Relator charges Mehmken with violating Canon 1, DR 1-102(A)(1), (3), (4), and (6), of the Code of Professional Responsibility as adopted by this court. We have consistently held that a violation of any of the ethical standards relating to

the practice of law or any conduct of an attorney which tends to bring reproach upon the courts or the legal profession constitutes grounds for suspension or disbarment. *State ex rel. NSBA v. Kirshen*, 232 Neb 445, 441 N.W.2d 161 (1989). See, also, *State ex rel. NSBA v. Rasmussen*, 232 Neb. 53, 439 N.W.2d 481 (1989); *State ex rel. NSBA v. Statmore*, 218 Neb. 138, 352 N.W.2d 875 (1984); *State ex rel. NSBA v. Doerr*, 216 Neb. 504, 344 N.W.2d 464 (1984). Also, we have held that the conviction of a felony or misdemeanor involving moral turpitude rendered upon a plea of nolo contendere is conclusive upon a respondent lawyer in a disciplinary proceeding and is sufficient to authorize the court to impose discipline. *State ex rel. Nebraska State Bar Assn. v. Leonard*, 212 Neb. 379, 322 N.W.2d 794 (1982).

The convictions set forth above evidence conduct that constitutes a violation of the aforementioned code sections and a violation of Mehmken's oath as an attorney. Accordingly, Mehmken is ordered disbarred, effective immediately.

JUDGMENT OF DISBARMENT.

WHITE, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. STANLEY R. NASH, APPELLANT.
524 N.W.2d 351

Filed December 2, 1994. No. S-94-251.

1. **Criminal Law: Judgments: Motions for New Trial: Time.** In a criminal case, the judgment occurs when the verdict and sentence are rendered by the court, and a motion for new trial does not toll the running of the 30-day jurisdictional requirement of Neb. Rev. Stat. § 25-1912 (Cum. Supp. 1994).
2. **Motions for New Trial: Judgments: Time.** A motion for new trial filed prior to the formal entry of judgment is a nullity unless the record shows that the motion relates to the decision which has been announced by the trial court and the record shows that a judgment was subsequently rendered or entered in accordance with the decision which was announced and to which the motion for new trial relates.

3. _____: _____: _____. Generally, the filing of a motion for new trial before the judgment is announced is a nullity.

Appeal from the District Court for Dawson County: DONALD E. ROWLANDS II, Judge. Appeal dismissed.

Scott H. Trusdale, of Trusdale & Trusdale, P.C., for appellant.

Don Stenberg, Attorney General, and Kimberly A. Klein for appellee.

HASTINGS, C.J., WHITE, CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ., and BOSLAUGH, J., Retired.

HASTINGS, C.J.

Stanley R. Nash appeals from the judgment of the district court overruling his motion for new trial. A jury found Nash guilty of second degree murder and use of a weapon to commit a felony by its verdict returned on July 22, 1993. Nash alleges as error the failure of the trial court to instruct the jury on the issue of malice as an element of the crime of second degree murder and the failure to sustain Nash's motion for judgment notwithstanding the verdict based on the lack of evidence to sustain a finding of either intent or malice.

However, Nash has created a procedural morass. He filed a motion for new trial on July 26, 1993, claiming an abuse of discretion by the trial court in sentencing him, that the sentence was not sustained by sufficient evidence, that the sentence was contrary to law, and that there existed newly discovered evidence. The motion was filed within 10 days of the verdict. However, the court did not impose sentence until September 24, 1993, while the motion was pending. The motion for new trial was overruled by journal entry filed February 24, 1994, and the notice of appeal was filed on March 9, 1994, which purported to "appeal the Judgment imposed thereunder in the above-entitled matter . . . ." The notice of appeal was filed within 30 days of overruling the motion for new trial, but some 5 months after imposing sentence, which was the judgment of the court.

This is an appropriate time to caution Nash, and the bar generally, that in a criminal case the judgment occurs when the

verdict and sentence are rendered by the court. A motion for new trial does not toll the running of the 30-day jurisdictional requirement of Neb. Rev. Stat. § 25-1912 (Cum. Supp. 1994). *State v. McCormick and Hall, ante* p. 271, 518 N.W.2d 133 (1994).

> Although § 25-1912(2) provides for the termination of the 30-day limitation period, this terminating provision does not apply to criminal actions. *Spotted Elk, supra.* Thus, the filing of a motion for new trial shall have no effect on the jurisdictional requirement that, in a criminal action, an appealing party must file a notice of appeal within 30 days after the *date of sentencing*.

(Emphasis supplied.) *Id.* at 275, 518 N.W.2d at 137.

> Although the filing of a motion for new trial in a criminal case does not terminate the running of the 30-day period in which a criminal defendant must file a notice of appeal, the Nebraska criminal procedure statutes allow a criminal defendant to file a motion for new trial . . . . It is also apparent from a reading of the relevant statutes that a party who timely files a motion for new trial pursuant to those statutes may appeal from the overruling of such a motion provided that the party complies with § 25-1912(1). In this respect, a party may be able to preserve for appellate review issues which are presented to the district court in a timely filed motion for new trial. We caution, however, that such an appeal will be limited to those issues properly presented to the trial court in the motion.

Id. at 275-76, 518 N.W.2d. at 138.

The motion for new trial in this case was filed after verdict, but before sentence and judgment. The motion for new trial related to sentencing, which had not yet occurred.

In *State v. Kolar*, 206 Neb. 619, 620-22, 294 N.W.2d 350, 352 (1980), *overruled on other grounds, State v. Obermier*, 241 Neb. 802, 490 N.W.2d 693 (1992), we said:

> As we have already indicated, the appeal was filed within 1 month after the overruling of the motion for new trial. However, if by reason of the motion for new trial having been filed prior to the formal entry of judgment,

the motion for new trial was a nullity, the appeal should have been filed within 1 month after the rendition of the judgment or decree and it was not.

. . . "We now hold that a motion for new trial filed after the trial court has announced its decision, but before a judgment has been rendered or entered, is effective and does not constitute a nullity *if the record shows that the motion for new trial relates to the decision which has been announced by the trial court and the record shows that a judgment was subsequently rendered or entered in accordance with the decision which was announced and to which the motion for new trial relates.*" We perceive no reason why we should not adopt a similar rule with regard to a motion for new trial in a criminal case as well, and we now hold that a motion for new trial filed in a criminal case after the trial court has announced its decision, but before a judgment has been entered, is effective and does not constitute a nullity, *if the record shows that the motion for new trial relates to the decision which has been announced by the trial court and the record shows that a judgment was subsequently rendered or entered in accordance with the decision which was announced and to which the motion for new trial relates.*

(Emphasis supplied.) Obviously, that exception does not apply in this case, and the filing of a motion for new trial *before the judgment was announced* is a nullity. See *State v. Spotted Elk*, 227 Neb. 869, 420 N.W.2d 707 (1988). Nash having failed to comply with the requirements of § 25-1912(1), no jurisdiction is conferred on this court, and the appeal must be dismissed.

APPEAL DISMISSED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. JOEL L. KLAUSEN, RESPONDENT.

524 N.W.2d 353

Filed December 2, 1994. No. S-94-1062.

Original action. Judgment of disbarment.

HASTINGS, C.J., CAPORALE, FAHRNBRUCH, LANPHIER, and WRIGHT, JJ., and BOSLAUGH, J., Retired.

PER CURIAM.

Joel L. Klausen was admitted to the practice of law in Nebraska in 1983. On February 7, 1994, the U.S. Bankruptcy Court for the District of North Dakota held Klausen in civil and criminal contempt for failure to repay professional fees that had been voluntarily paid to him by his clients, the debtors in the underlying case. Furthermore, on June 1, the U.S. Bankruptcy Court for the Southern District of Iowa held Klausen in civil and criminal contempt for failure to repay professional fees that had been voluntarily paid to him by his clients, the debtors in the underlying case.

On November 7, Klausen voluntarily surrendered his license. He admitted that his conduct violated Canon 1, DR 1-102(A)(1), (5), and (6), of the Code of Professional Responsibility as adopted by this court. Klausen has admitted that his conduct violated his oath of office as an attorney.

Klausen waived his right to notice, appearance, or hearing prior to entry of this order. We accept Klausen's surrender and order him disbarred from the practice of law in the State of Nebraska, effective immediately.

JUDGMENT OF DISBARMENT.

WHITE, J., not participating.

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